

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 31

INTERNATIONAL ASSOCIATION OF MACHINISTS,
AN UNINCORPORATED ASSOCIATION; CHARLES
TRUAX, INDIVIDUALLY; ETC., ET AL.,
PETITIONERS,

vs.

MARCOS GONZALES.

ON WRIT OF CERTIORARI TO THE CALIFORNIA DISTRICT COURT OF
APPEAL, FIRST APPELLATE DISTRICT

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[fol. 1]

[File endorsement omitted]

**IN THE SUPERIOR COURT OF THE STATE OF
CALIFORNIA IN AND FOR THE CITY AND
COUNTY OF SAN FRANCISCO**

No. 423147

MARCOS GONZALES, Petitioner,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, an unincorporated association; CHARLES TRUAX, individually and as International Representative thereof; THOMAS E. McSHANE, and A. C. McGRAW, as International Representatives thereof; INTERNATIONAL ASSOCIATION OF MACHINISTS, LOCAL LODGE No. 68, an unincorporated association; ROBERT ROLLER, as President of said Local Lodge; REESE CONTE, as Secretary of said Local Lodge; EDWARD PECK, as Treasurer of said Local Lodge; FIRST DOE, SECOND DOE, THIRD DOE, FOURTH DOE, and FIFTH DOE, Respondents.

PETITION FOR WRIT OF MANDATE—Filed December 3, 1952

The petition of **MARCOS GONZALES** respectfully shows:

I

That respondents International Association of Machinists (hereinafter referred to as Grand Lodge) and International Association of Machinists, Local Lodge No. 68 (hereinafter referred to as Local Lodge) are, and at all times herein [fol. 2] mentioned were, unincorporated associations formed and existing for the purpose of collective bargaining, and of representing and safe guarding the interests of their members, and doing business in the City and County of San Francisco, State of California.

II

That respondents, Charles Truax, Thomas E. McShane and A. C. McGraw, are, and at all times herein mentioned

were, officers of respondent Grand Lodge, to wit, International Representatives thereof.

That respondents Robert Roller, Reese Conte and Edward Peck are officers of respondent Local Lodge, to wit, President, Secretary and Treasurer, respectively, thereof, and are sued herein in their said representative capacities.

Petitioner alleges on information and belief that at all times material herein all of the said named respondents were residents of the City and County of San Francisco, State of California.

III

Petitioner does not know the true names of respondents sued herein by the fictitious names of First Doe, Second Doe, Third Doe, Fourth Doe, and Fifth Doe, and prays leave to substitute said true names herein when ascertained.

IV

That prior to January 30, 1951, petitioner was a member in good standing of the respondent associations and entitled [fol. 3] to all the rights and privileges of such membership, including the right to work as a member thereof under collective bargaining agreements with employers, and the right to other benefits, including among others, the right to death benefits, sick benefits, and the aid and assistance of the said associations in all disputes with petitioner's employers and said rights were recognized by said respondent associations and the respondent officers thereof until a certain purported expulsion of petitioner from said associations occurred, as hereinafter more particularly described. Since such purported expulsion, respondent associations and the officers thereof have denied and refused to petitioner any and all rights and privileges as a member of said associations, and as a proximate and direct result thereof, petitioner has been denied employment in his usual trade and occupation as a marine machinist.

V

That on or about June 21, 1950, there was filed against petitioner by respondent Charles Truax certain charges,

to wit, that petitioner had violated Article XXV, Section 1, of the Constitution of the respondent Grand Lodge; in that he had allegedly made or caused to be made or circulated false and malicious statements reflecting upon the private and public conduct of an officer of said Grand Lodge, to wit, the respondent Charles Truax, and that this conduct was "unbecoming conduct." That the said alleged false and [fol. 4] malicious statements consisted of the institution of an action for damages in the Superior Court of the State of California, in and for the City and County of San Francisco on March 9, 1949, entitled "Marcos Gonzales, Plaintiff v. Kenneth Nelson, Charles Truax, Doe One, Doe Two and Doe Three, Defendants," No. 384791, seeking damages for assault and battery alleged to have been committed by the defendants in that action against petitioner.

VI

That the petitioner had on the said date filed said action against the defendants named in said action; that a judgment of non-suit was returned as against the defendant Truax, and a judgment of \$10,000 was recovered by petitioner against defendant Nelson in said action.

VII

That on or about July 7, 1950, a purported trial was held in the City and County of San Francisco by respondent Grand Lodge and Local Lodge; that respondent Truax appeared as "plaintiff" or prosecutor in the said alleged trial. That petitioner was present at the said trial.

VIII

That following said trial, and on July 19, 1950, the decision of the trial committee that petitioner was guilty as charged was reported to the respondent associations; that members of respondent Local Lodge thereupon voted, in accordance with the provisions of Article K, Section 6, of [fol. 5] the Constitution of said Local Lodge, which provides as follows:

"Sec. 6. The trial committee shall report at the next regular meeting of the local lodge. Such report shall be in two parts as follows:

"First: The report shall contain the findings and verdict of the trial committee together with a synopsis of the evidence and testimony presented by both sides.

"After the trial committee has made necessary explanation of its intent and meaning, the trial committee's verdict with respect to guilt or innocence of the defendant, shall be submitted without debate to a vote by secret ballot of the members of the local lodge.

"Second: If the lodge concurs with a 'guilty' verdict of the trial committee, the recommendations of the committee as to the penalty to be imposed shall be submitted in a separate report to the lodge and voted on by secret ballot of the members then in attendance."

That the vote of said members was 43 to 31 against the recommendation of the trial committee.

IX.

That thereafter on July 28, 1950, respondent Truax ap-[fol. 6] pealed the decision of the membership rejecting the recommendation of the trial committee to the Grand Lodge, in accordance with the provisions of Article K of said Constitution, of said Local Lodge.

X

That thereafter on or about August 2, 1950, said Local Lodge purported to reconsider the action taken at the meeting of July 19, and again voted on the report and recommendation of the trial committee. That the vote of the membership on said August 2, 1950, was 29 to 14 to sustain the report and recommendation of said trial committee.

XI

That by reason of the said purported reconsideration there was a purported expulsion of petitioner by the said respondent associations. That thereafter, on or about Au-

gust 15, 1950, petitioner appealed the purported expulsion to the International President, in accordance with the Constitution and Laws of the respondent associations. That said President purported to set aside expulsion of petitioner and imposed upon him a penalty, to wit, payment of a \$500 fine and the furnishing of a written apology to respondent Truax, a copy of said apology to be furnished to respondent Grand Lodge.

XII

That thereafter petitioner pursued the various appeals permissible and available under the Constitution and Laws [fol. 7] of the respondent associations, and on November 7, 1952, by the final decision of the Executive Council of said Grand Lodge, the decision of the President of said Grand Lodge was sustained. That petitioner has refused, on the grounds that the said decision was illegal as hereinafter set forth, to pay the said fine or apologize to respondent Truax. That petitioner has been in effect expelled from membership in the respondent associations, by a notice to him that his membership had lapsed by reason of his failure to comply with the said decision of the President of the respondent Grand Lodge.

XIII

That said purported expulsion, fine, and denial of all benefits of membership to your petitioner was and is null and void and of no effect, and was and is illegal. That said acts of respondents illegally deprived petitioner of the rights and privileges of members in the associations, and each of them, in that the procedure set forth in the Constitutions of the respondent associations with respect to the trial and punishment of members was substantially violated in numerous respects, including

- 1) The purported reconsideration of the vote of the membership rejecting the report and recommendation of the trial committee was without authority under the Constitutions and laws of the respondent associations.

- 2) Petitioner was deprived of a fair and impartial tribunal [fol. 8] for the said purported trial.

3) Petitioner was denied due process of law in the course and conduct of said trial and its consideration by the members of Local Lodge and the appeals thereafter.

4) The acts charged against petitioner do not constitute an offense under the provisions of the Constitution and laws of respondent associations, authorizing or warranting such punishment.

5) Filing of charges against petitioner, his trial, purported expulsion, fine and other punishment by reason of your petitioner's filing of the aforesaid law suit against the respondent Truax and Kenneth Nelson constituted a violation of your petitioner's constitutional rights under the Constitutions of the United States and California to freedom of speech and to use of the civil courts.

6) The said charges made against petitioner and his punishment after the purported trial were made for the purpose of denying and in fact resulted in a denial to petitioner of his right to freedom of speech.

XIV

By reason of the illegal procedures set forth above and by reason of the violation of petitioner's rights to freedom of speech as hereinabove set forth, petitioner has been deprived of his rights as a member of said associations without due process of law.

[fol. 9]

XV

From and after March 5, 1952, your petitioner has been unable to secure employment in his former occupation, solely by reason of the illegal, wrongful and improper expulsion and punishment of petitioner by respondent associations, and your petitioner is informed and he believes and therefore alleges that in all probability he will be unable to secure regular employment in his trade or occupation until the final decision of this Court on this petition for mandate restores your petitioner to his former rights, privileges, and status in said respondent associations. That during the period from March 5, 1952, to date of this petition, petitioner has suffered loss of earnings in the approxi-

mate sum of \$5,320. That at the time of trial of this action petitioner will ask leave of court to amend this petition to insert herein such additional damages as may be suffered by your petitioner from the date hereof to the date of trial.

XVI

That your petitioner has duly sought and exhausted all remedies available to him within respondent associations, and your petitioner has no plain, speedy or adequate remedy in the ordinary course of law.

Wherefore, your petitioner prays that an alternative writ of mandate be issued against respondents, returnable within such time as the Court may allow, compelling respondents to restore to petitioner all of his rights, and privileges [fol. 10] in respondent associations and to reinstate petitioner as a member in good standing thereof, without payment of any fine or the statement of any apology to the respondent Truax or to any other person, or to show cause why they should not do so; for damages suffered by petitioner as a result of petitioner's illegal and unlawful expulsion from respondent associations as hereinabove set forth, and for such other and further relief as to the Court may seem meet and proper in the premises.

Gladstein, Andersen & Leonard, by /s/ Lloyd E.
McMurray, Attorneys for Petitioner.

[fol. 11]

[File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA ORDER GRANTING ALTERNATIVE WRIT OF MANDATE AND DIRECTING ISSUANCE THEREOF—December 3, 1952

Upon reading and filing the verified petition of Marcos Gonzales, and on motion of Lloyd E. McMurray, Esq., attorney for petitioner, and good cause appearing:

It is hereby ordered that an alternative writ of mandamus issue out of and under the seal of this Court, directed to

International Association of Machinists, an unincorporated association, Charles Truax, individually and as International Representative thereof, Thomas E. McShane and A. C. McGraw, as International Representatives thereof, International Association of Machinists, Local Lodge No. 68, an incorporated association, Robert Roller, as President of said Local Lodge, Reese Conte, as Secretary of said Local Lodge, Edward Peck, as Treasurer of said Local Lodge, First Doe, Second Doe, Third Doe, Fourth Doe, and Fifth Doe, commanding them that they do restore to Marcos Gonzales, petitioner herein, all his rights and privileges in the said International Association of Machinists and International Association of Machinists, Local Lodge No. 68, and reinstate said petitioner as a member in good standing thereof without payment of any fine or the statement of any [fol. 12] apology to the respondent Truax or to any other person, and that they pay damages to petitioner for his wrongful and illegal expulsion from said associations, or that in default thereof, they show cause before this Court in Dept. 21 thereof, at the City Hall in the City and County of San Francisco, State of California, on the 11th day of December, 1952, at 10 o'clock A.M. of said day, why they have not done so, by the return to said writ.

It is further ordered that a copy of said petition be served on said respondents with such writ.

Dated this Dec 3—1952 day of December, 1952.

/s/ Albert C. Wollenberg, Judge of the Superior Court.

[fol. 16] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

NOTICE OF MOTION TO STRIKE PORTIONS OF PETITION—Filed
December 23, 1952

To Marcos Gonzales and to Gladstein, Anderson & Leonard
and Lloyd E. McMurray, his attorneys:

Please take notice that on the 30th day of December, 1952,
at the hour of 10:00 o'clock A.M., or as soon thereafter as

counsel may be heard, that on behalf of the above named Respondents, except Charles Truax, and First through Fifth Doe, there will be a motion made to the court for an order striking from the petition the following allegations contained therein;

Page 3, lines 26 through 28; "and a judgment of \$10,000.00 was recovered by petitioner against defendant Nelson in said action."

Page 5, line 23 through 27; "That petitioner has been in effect expelled from membership in the respondent associations, by a notice to him that his membership had lapsed by reason of his failure to comply with the said decision of the President of the respondent Grand Lodge."

Page 5, lines 29 through 32 and page 6, lines 1 through 5: "That said purported expulsion, fine and denial of all benefits of membership to your petitioner was and is null and void and of no effect, and was and is illegal. That [fol. 17] said acts of respondents illegally deprived petitioner of the rights and privileges of members in the associations, and each of them, in that the procedure set forth in the Constitutions of the respondent associations with respect to the trial and punishment of members was substantially violated in numerous respects."

Page 6, lines 6 through 9: "The purported reconsideration of the vote of the membership rejecting the report and recommendation of the trial committee was without authority under the Constitutions and laws of the respondent associations."

Page 6, lines 10 and 11: "Petitioner was deprived of a fair and impartial tribunal for the said purported trial."

Page 6, lines 12 through 14: "Petitioner was denied due process of law in the course and conduct of said trial and its consideration by the members of Local Lodge and the appeals thereafter."

Page 6, lines 15 through 18: "The acts charged against petitioner do not constitute an offense under the provisions of the Constitution and laws of respondent associations, authorizing or warranting such punishment."

Page 6, line 19 through 25: "Filing of charges against petitioner, his trial, purported expulsion, fine and other punishment by reason of your petitioner's filing of the aforesaid law suit against the respondent Truax and [fol. 18] Kenneth Nelson constituted a violation of your petitioner's constitutional rights under the Constitutions of the United States and California to freedom of speech and to use of the civil courts."

Page 6, lines 26 through 29: "The said charges made against petitioner and his punishment after the purported trial were made for the purpose of denying and in fact resulted in a denial to petitioner of his rights to freedom of speech."

Page 6, lines 31 and 32, page 7 line 1 through 3:

"By reason of the illegal procedures set forth above and by reason of the violation of petitioner's rights to freedom of speech as hereinabove set forth, petitioner has been deprived of his rights as a member of said associations without due process of law."

Page 7, lines 5 through 16: "From and after March 5, 1952, your petitioner has been unable to secure employment in his former occupation solely by reason of the illegal, wrongful and improper expulsion and punishment of petitioner by respondent associations, and your petitioner is informed and believes and therefore alleges that in all probability he will be unable to secure regular employment in his trade or occupation until the final decision of this Court on this petition for mandate restores your petitioner to his former rights, privileges and status in said respondent associations. That during the period from March 5, 1952, to date of this petition, petitioner has suffered loss [fol. 19] of earnings in the approximate sum of \$5,320."

Said motion will be made on the ground that said allegations are irrelevant and redundant and will be based upon this notice, the pleadings and papers on file herein and the Points and Authorities served herewith.

Phoenix and Kennedy, By /s/ Eugene K. Kennedy,
Attorneys for Respondents, Except Charles Truax.

[fol. 23]

[File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

ANSWER—Filed December 23, 1952

Come now the respondents named herein, except respondent, Charles Truax, and First through Fifth Doe and answer the petition on file herein as follows:

I

Answering paragraph IV, respondents deny that petitioner was expelled from said Associations. Respondents further deny that petitioner has been denied employment in his usual trade and occupation by any acts whatsoever of respondents.

II

Answering paragraph V, respondents deny that the alleged false and malicious statements referred to in said paragraph consisted of an institution of an action for damages. Respondents admit that one of the bases of the charges filed by respondent Charles Truax included allegations set forth in the complaint in the civil action referred to in said paragraph V.

III

Answering paragraph XII, respondents deny that petitioner pursued the various appeals permissible and available under the Constitution and Laws of the respondent [fol. 24] associations.

Respondents deny that the final decision of the Executive Council was made on November 7, 1952, but allege that it was made on or about January 30, 1951.

Answering the allegations contained in said paragraph XII that petitioner has refused on the ground that said decision was illegal as hereinafter set forth to pay the said fine or apologize to respondent Truax, respondents allege that they do not have sufficient information or belief to answer said allegation and on that basis deny the same.

IV

Respondents deny each and every allegation contained in paragraph XIII.

V

Respondents deny each and every allegation contained in paragraph XIV.

VI

Respondents deny each and every allegation contained in paragraph XV.

VII

Respondents deny each and every allegation contained in paragraph XVI.

As a Further and Separate Answer and Defense to the Petition, Respondents Allege

[fol. 25]

1

That petitioner has not sought or exhausted all the remedies available to him within the respondent associations, in that petitioner failed to take an appeal from the decision of the executive council to a convention of the Grand Lodge or to the membership at large by submission thereof through the referendum, as provided in Section 6 of the Constitution of the Grand Lodge District and Local Lodges, Councils and Conferences, set forth as follows on Page 59 of said Constitution:

"Sec. 6. Appeals may be taken from the decision of the International President to the Executive Council. Appeals may be taken from the decision of the Executive Council to a convention of the Grand Lodge, or to the membership at large by submission thereof through the referendum. All appeals shall be laid before the body to whom addressed through the General Secretary-Treasurer. Before any appeals can be taken from any decision of the Executive Council, the decision, and all orders of the Executive Council in relation thereto, must be fully complied with by all parties

concerned therein in order to entitle them to enter an appeal, and in no case shall any district or local lodge, or any individual member or members thereof, appeal to the civil courts for redress until after having ex-[fol: 26]hausted all rights of appeal under the provisions of this Constitution. No member of the Executive Council shall have a vote on any appeal on which he has already rendered a decision."

As and for the Further and Separate Answer to
Said Petition, Respondents Allege

I

That the plain, speedy and adequate remedy in the ordinary course of law is available to the petitioner under the provisions of Sections 8 (b) (1) and 8 (b) (2) of the National Labor Relations Act as amended.

As and for a Further and Separate Answer and
Defense to the Petition Respondents Allege

I

Respondents deny that under the rules and regulations of their organizations that they have authority or ability to reinstate petitioner.

Wherefore, respondents pray that the petition herein be quashed and that respondents be awarded judgment, together with costs of suit and for such other and further relief as to the court may seem proper.

Phoenix and Kennedy, By /s/ Eugene K. Kennedy,
Attorneys for Respondents, Except Charles Truax.

[fol. 28] [File endorsement omitted].

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
MINUTE ORDER DENYING MOTION TO STRIKE PARTS OF
PETITION AND OVERRULING DEMURRER—January 22, 1953

In this action the motion to strike out parts of petition, and, the demurrer of respondent, except Charles Truax and

First Doe through Fifth Doe, having been heretofore submitted to the Court for consideration and decision, and now the Court having considered the same and being fully advised in the premises.

It is ordered that said motion to strike out be denied.

It is further ordered that the demurrer to petition be overruled, with leave to respondents to answer within 10 days.

[fol. 30]

[File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
MOTION AND NOTICE OF MOTION FOR LEAVE TO FILE SUPPLEMENT TO PETITION FOR WRIT OF MANDATE—Filed
February 2; 1954

To Respondents Above Named and to Messrs. Phoenix and Kennedy, Their Attorneys:

You will each please take notice that on Monday, February 8, 1954, at the hour of 10 o'clock a. m. of said day, or as soon thereafter as counsel can be heard, petitioner herein will move the above-entitled Court before the Hon. John B. Molinari, Judge thereof, in his courtroom, City Hall, San Francisco, California, for its order allowing the filing of a supplement to his petition herein, a copy of which supplement is attached hereto and incorporated herein as though fully set forth.

Dated: February 1, 1954.

Gladstein, Andersen & Leonard, By /s/ Lloyd E. McMurray, Attorneys for Petitioner.

[fol. 32]

[File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
SUPPLEMENT TO PETITION FOR WRIT OF MANDATE—Filed
February 2, 1954

Comes now petitioner herein and by leave of Court supplements his petition for writ of mandate on file herein by adding thereto the following additional allegations:

XVII

That by reason of petitioner's said wrongful and illegal expulsion from respondent association, and by threats made by respondents against petitioner and by other acts of said respondents, petitioner has been caused to and has suffered grievous physical and mental pain and suffering, humiliation, worry and degradation, to his damage in the sum of \$15,000.

XVIII

That the acts of the respondents as herein set forth were malicious acts of fraud and oppression entitling petitioner to exemplary damages under the provisions of Sec. 3294 of the Civil Code.

Wherefore, your petitioner prays in addition to the relief heretofore prayed for that he be granted the sum of \$15,000 as damages for humiliation and mental and physical suffering, together with such damages as the Court [fol. 33] may deem meet and just by way of exemplary damages.

Dated: February 1, 1954.

Gladstein, Andersen & Leonard, By /s/ Lloyd E.
McMurray, Attorneys for Petitioner.

[fol. 34] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

MINUTE ORDER OF JUDGMENT—June 7, 1954

In this cause, heretofore submitted, the Court ordered as follows, to-wit:

1) Motion for leave to file supplement to and to amend writ of mandate granted.

2) Writ of mandate ordered issued commanding and directing the respondents to restore petitioner to all of his rights and privileges in respondent associations and to reinstate petitioner as a member in good standing thereof, without payment of any fine or the statement of any apology to the respondent Truax or to any other person.

3) The petitioner is awarded damages only against the respondents, International Association of Machinists, (Grand Lodge), and International Association of Machinists, Local Lodge No. 68, for \$6,800.00 damages for loss of wages and \$2500.00 damages for mental suffering, humiliation and distress.

4) The trial court retains jurisdiction for purpose of awarding such additional damages as might be suffered by petitioner until he is actually restored to his rights and privileges in the Association and reinstated therein.

Plaintiff to prepare findings.

[fol. 35] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

MEMORANDUM OF DECISION—June 7, 1954

This Court has made its order that a Writ of Mandate directing and compelling respondents to restore to petitioner all of his rights and privileges in respondent associations and to reinstate petitioner as a member in good standing thereof without payment of any fine or the statement of any apology to the Respondent Truax or to any

other person, and has ordered judgment for damages, upon the ground and for the reason that petitioner was deprived of his said rights, duties and membership in an illegal manner.

In arriving at its decision this Court is not unmindful of the following general propositions of law which are applicable to labor unions and associations, to wit: That the Charter of a subordinate lodge and the constitution and by-laws of the parent organization constitute the contract between the lodge and the parent organization; that the subordinate lodge constitution and by-laws constitute a contract between the lodge and its members; that the rights and duties of members, the conditions of membership, and the gaining and losing of membership are limited and must be measured by the terms of the contract; and that a [fol. 36] member of associations of this type must first exhaust the rights afforded him by the tribunals of the association before he may seek redress from the courts. (Smitherham v. Laundry Workers Union, 44 CA (2d) 131; Bush v. International Alliance, 55 CA (2d) 357; McConville v. Milk Union, 106 Cal. App. 696).

It is likewise settled law, however, that once a person has acquired the personal right of membership under such a contract he cannot be deprived of it except upon a strict observation of the proceedings prescribed for its termination in the constitution or by-laws of the association of which he is a member; and that where such an association has violated its own laws and regulations and has arbitrarily violated a member's property rights the member need not exhaust his remedies within the organization before resort is had to the courts. (Dingvall v. Amalgamated Association, 4 CA 565; Weber v. Marine Cooks, 93 CA (2) 327; Harris v. National Union, 98 CA (2d) 733; Cason v. Glass Bottle Blowers, 37 Cal. (2d) 134.)

Aside from the question as to whether or not Article XXV, Section 1, of the Grand Lodge Constitution was effective at the time the petitioner made the allegedly false and malicious statements reflecting upon the private and/or public conduct of respondent Truax, it appearing that the said statements were contained in a complaint for damages for assault and battery filed in the Superior Court

of the City and County of San Francisco, filed on March 9, [fol. 37] 1949, and it further appearing that said Article XXV, Section 1, became effective April 1, 1949, (upon a revision of a previous Constitution which may have contained similar provisions) we are of the opinion that there was sufficient evidence before the association to support the conclusion of the Trial Committee that the petitioner had violated said provisions particularly in view of the fact that petitioner admitted before the Trial Committee on July 7, 1950, that he had no proof or evidence that Truax had assaulted him or that he instructed or, advised anyone else to do it. Conceding for the purposes of this decision that there was such a Constitutional provision in effect at the time petitioner allegedly violated it, we are constrained—it not being the province of this Court to consider the weight of such evidence or to substitute our judgment thereon for that of Trial Committee before whom petitioner was tried—to hold that there was evidence to support its conclusion that petitioner was guilty of such violation.

The illegality of the proceedings appears after the Trial Committee submitted its report to the membership of the Lodge. Article K of the Constitution for the Local Lodge specifically and in great detail sets forth the trial procedure and the voting upon said report. In Section 6 of Article K it is specifically provided that the "trial committee shall report at the next regular meeting", and the Trial Committee did so in this case. That Article clearly [fol. 38] indicates that the Trial Committee's recommendations are to be voted upon at this meeting. That procedure was followed in this case and the membership by secret ballot rejected the recommendation of the Trial Committee and in effect rendered a "Not Guilty" verdict. Thereafter, at the next meeting on August 2, 1950, and without any previous notice therefore, the membership re-cinded its action of the previous meeting and concurred in the "guilty verdict" of the trial committee and voted to expel petitioner. The only authority for this subsequent action is to be found in Rule 27 of Rules of Order of the Constitution for Local Lodges which provides: "All questions, *unless otherwise provided*, shall be decided in accordance

with the Robert's Rules of Order," (italics ours). It is our opinion that this action taken on Aug. 2, 1950, is illegal. Although Robert's Rules of Order provide for the re-cission of some action previously taken, they cannot, as said in *Harris v. National Union, etc.*, 98 CA (2) 733, "change the plain requirement of the constitution nor convert by procedural slight of hand" the procedure which the constitution requires. Petitioner was acquitted under the specific provisions of Article K, the procedural provisions of which, cannot be avoided by resort to Robert's Rules of Order. We are also of the opinion that even if it be conceded that the action of Aug. 2, 1950, was proper that the penalty of expulsion is illegal. Section 7 of Article K requires "a $\frac{2}{3}$ vote of those voting to expel the defendant [fol. 39] from membership" (italics ours). The vote was 29 yes, 14 noes and one blank. Forty-four persons voted on the question of the Trial Committee's recommendation of expulsion. A $\frac{2}{3}$ vote required 30 to vote for expulsion. Merely because one person declined to vote either for or against expulsion is no indication that he was not voting. It may be reasoned that by declining to vote either for or against expulsion he was exercising his right to indicate that he was in favor of some form of punishment other than that recommended by the committee as contemplated in Section 7 of Article K.

Although petitioner could then have sought redress to the courts, he chose to appeal to the International President as provided by the Grand Lodge Constitution. The International President should have reversed the decision of Aug. 2, 1950, on the grounds that the same was illegal. Instead he affirmed the finding of "guilty" but modified the penalty to a \$500.00 fine and an apology. In this regard it should be pointed out that the only penalty provided for the offense herein charged is "fine or expulsion, or both" (Article XXV Section 1 of the Grand Lodge Constitution). There is no penalty providing for an apology nor is there any fine authorized in excess of \$50.00. (Section 8 of Article K). Nowhere do we find any provision empowering the International President to impose a penalty other than expulsion or "fine in excess of \$50.00", unless the [fol. 40] same is *first* approved by the Executive Council,

which approval was not had in this case. It must be noted also that the International President regarded the action of Aug. 2, 1950, as a "reconsideration" of the action taken on July 19, 1950, rather than a motion "to rescind." (See Plaintiff's Exhibit No. 5). Conceding for sake of argument, that reconsideration of the action taken on July 19, 1950, would have been proper, such action should have been taken on July 19, 1950, and not on Aug. 2, 1950. Rules 24 and 25 of the Rules of Order of the Constitution for Local Lodges provide, respectively, as follows: "When a question has been decided it can be considered by a majority vote of those present. . . . A motion to reconsider must be made and seconded by two members who voted with the majority." It does not appear that this procedure was followed either on July 19th or on August 2nd.

The fact that in his decision the International President stated "that his decision would have been exactly the same regardless of the fact that the Lodge at its meeting on Aug. 2, 1950, reversed the decision made on July 19" does not alter the situation. This statement is apparently with reference to the appeal respondent Truax had taken on July 28, 1950, with reference to the action taken on July 19, 1950, which appeal Truax withdrew on Aug. 22, 1950, after the action taken on Aug. 2, 1950, and after Petitioner's appeal filed on August 15, 1950. The International President was not considering Truax's appeal, but that of [fol. 41] Petitioner, which not only encompassed the findings of the Trial Committee but all the procedures of July 19 and Aug. 2, as well. Although the International President agreed with the findings of the Trial Committee and found that the same were based on substantial evidence, it was his duty as an appellate tribunal to reverse the Local Lodge upon the ground that the prescribed constitutional procedures had not been followed. If Truax had prosecuted his appeal, then the action of the International President in affirming the findings of the Trial Committee would have been regular, because then he would be reversing the Local Lodge as to the action it had taken on July 19, the procedures up to that time being legal. Of course, as stated above, the penalty as modified by him was not legal. What we have stated here with reference

to the International President applies likewise to the Executive Committee which affirmed his decision.

When the Executive Committee affirmed the decision of the International President and the Local Lodge on February 11, 1952, advised petitioner that it would not continue to accept dues until the penalty fixed by the International President was complied with, the petitioner was deprived of rights and privileges in the union and in effect was suspended from membership (See Respondents' Exhibit E).

Petitioner was, by virtue of said action, prevented from working as a machinist and thereby sustained loss of wages. [fol. 42] The petitioner was out of work from March 4, 1952, to June 26, 1953, when he became incapacitated because of illness. We have assessed the damages for said period to be in the sum of \$6,800.00 at the rate of \$100.00 per week, which, as testified by petitioner, was the lowest weekly wage received by him during the years 1950, 1951 and 1952. Had petitioner not been incapacitated by a disabling illness on June 26, 1953, which prevented him from engaging in any employment whatever, this Court would have been obliged to assess damages on the above basis until the date of judgment. The award of damages for \$2,500.00 for mental distress is proper, we believe, under the evidence and all the circumstances, and pursuant to the authority of *Taylor v. Marine Cooks and Stewards*, 117 CA (2d) 556. We did not award any exemplary damages because there is no evidence of malice or fraud on the part of the respondents.

With respect to damages, the Court has made a further order to the effect that the trial court retains jurisdiction for the purpose of awarding such additional damages as might be suffered by petitioner until he is actually restored to his rights and privileges in the respondent associations and reinstated to membership therein.

The attorneys for petitioner are directed to prepare Findings of Fact and Conclusions of Law pursuant to the Minute Orders for a Writ of Mandate and for judgment for damages heretofore made and pursuant to this memorandum.

[fol. 43] Dated: June 7, 1954.

/s/ John B. Molinari, Judge of the Superior Court.

[fol. 44]

[File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

Findings of Fact and Conclusions of Law—July 29, 1954

The above cause came on for trial before the Court, sitting without a jury, on the 25th day of August, 1953, and again on the 3rd day of February, 1954, and evidence having been received and memoranda of law having been thereafter submitted to the Court and the cause submitted, and the Court having issued its memorandum of decision, the Court now makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I

It is true that the respondents International Association of Machinists (hereinafter referred to as Grand Lodge) and the International Association of Machinists, Local 68 (hereinafter referred to as Local Lodge), are and at all times material herein were unincorporated associations formed and existing for the purpose of collective bargaining and of representing and safeguarding the interests of their members, and that said associations were at all times material herein and are doing business in the City and County of San Francisco, State of California:

[fol. 45]

II

It is true that respondents Charles Truax, Thomas E. McShane and A. C. McGraw at all times material herein were officers of the respondent Grand Lodge.

It is true that respondents Robert Roller, Reese Conte and Edward Peck are officers of respondent Local Lodge.

III

It is true that at all times material herein prior to the purported expulsion of petitioner from said respondent associations, petitioner was a member in good standing of the respondent associations and entitled to all of the rights

and privileges of such membership; and that since said purported expulsion of petitioner, the respondent associations and the officers thereof have denied and refused to petitioner any and all rights and privileges as a member of said associations. It is true that as a proximate and direct result thereof petitioner has been denied employment in his usual trade and occupation as a marine machinist.

IV

It is true that on or about June 21, 1950, respondent Truax filed against petitioner in the respondent Local Lodge certain charges, to wit, that petitioner had made or caused to be made or circulated false and malicious statements reflecting upon the private and public conduct of the said Charles Truax as an officer of the respondent Grand Lodge and that this said alleged conduct was "unbecoming conduct." It is true that the said alleged false and malicious statements consisted of the allegations contained in a complaint for damages filed in the Superior Court of the State of California in and for the City and County of San Francisco in an action entitled "Marcos Gonzales, Plaintiff, v. Kenneth Nelson, Charles Truax, Doe One, Doe Two, and Doe Three, Defendants," No. 384791 in the files and records of this Court, by which action plaintiff sought damages for assault and battery alleged to have been committed against petitioner.

V

It is true that petitioner had in the said action of *Gonzales v. Nelson, Truax, et al.*, recovered a judgment in the sum of \$10,000 against one Nelson, a defendant in that action.

VI

It is true that on or about July 7, 1950, a purported trial of petitioner was held by the respondent associations; that thereafter, on July 19, 1950, the decision of the trial committee that petitioner was guilty as charged and the recommendation of the said committee that petitioner be expelled were reported to the respondent associations; that members of respondent Local Lodge thereupon voted se-

cretly in accordance with the provisions of Article K, Sec. 6, of the Constitution of said Local Lodge; that the vote of the said members was 43 to 31 against the recommendation of the trial committee.

[fol. 47]

VII

It is true that on or about August 2, 1950, the said Local Lodge purported to reconsider and rescind the action taken at the meeting of July 19 and again voted secretly on the report and recommendation of said trial committee, and that the ballots were 29 to sustain the report and recommendation of said trial committee, plus 14 against the recommendation, and one blank ballot.

VIII

It is true that the Constitution and By-Laws of said respondent associations require a secret ballot by those present at the meeting, and a two-thirds majority of those voting to support a recommendation of the trial committee that a member be expelled from said associations.

It is true that the Constitution and By-Laws of said Local Lodge require that a motion to reconsider must be made, and seconded by two members who voted with the majority on the previous vote, and that no record was or could have been made of the votes of individual members in the secret balloting held on July 19, 1950.

IX

It is true that thereafter petitioner appealed the purported expulsion to the President of said Grand Lodge, in accordance with the Constitution and laws of the respondent associations, and that the said President purported to set aside the expulsion of petitioner and imposed [fol. 48] upon a penalty of \$500 fine and the furnishing of a written apology to the respondent Truax.

X

It is true that thereafter petitioner pursued various appeals available under the Constitution and laws of the said respondent associations and that on November 7, 1952,

the decision of the President of the said Grand Lodge was purported to be sustained by the final decision of the Executive Council of the said Grand Lodge.

(Inserted)

Amended
7/29/54
John B. Molinari
Judge
(Signed)

(It is true that the Constitutions and
(
(laws of the respondent associations
(
(provided a further appeal to the con-
(
(vention of the Grand Lodge, and that
(
(petitioner did not pursue such further
(
(appeal.

XI

It is true that petitioner refused, on the grounds that the said decision was illegal, to pay the said fine or apologize to respondent Truax. It is true that petitioner has been in effect expelled from membership in the respondent associations by a notice from the said associations to him that his membership had lapsed by reason of his failure to comply with the said decision of the President of the respondent Grand Lodge.

[fol.49]

XII

It is true that from March 4, 1952, to June 26, 1953, petitioner has been unable to secure employment at his former occupation solely by reason of the purported expulsion of petitioner from respondent associations. It is true that by reason of petitioner's purported expulsion and as a proximate result thereof, petitioner was caused to and did suffer physical and mental pain and suffering, humiliation and anxiety. It is true that after June 26, 1953, and to the date of trial, petitioner was incapacitated for work because of illness.

XIII

It is true that the Constitutions and By-Laws of the respondent associations provide as a penalty for the offense charged against the petitioner only the punishment of fine or expulsion or both; and that said Constitutions and By-Laws provide no penalty in the form of requiring an apology; nor any fine in excess of \$50, unless the said fine is first approved by the Executive Council. It is true that the decision of said President of respondent Grand Lodge was not first approved by said Executive Council.

XIV

It is true that during the years 1950-1951-1952, while employed, petitioner's earnings were approximately \$100 per week or more.

From the foregoing findings of fact, the Court makes [fol. 50] the following

CONCLUSIONS OF LAW

I

That the purported expulsion of petitioner from the respondent associations was void and illegal in the following particulars:

1) The purported reconsideration or rescission on August 2, 1950, of the action taken on July 19, 1950, is not in accordance with the procedure set forth in the Constitutions and By-Laws of the respondent associations for the trial and punishment of members.

2) Petitioner had been on July 19, 1950, acquitted of the charges against him under the provisions of Article K of the Constitution and By-Laws of the respondent associations, and the procedural provisions of said Article K can not be avoided by resort to Robert's Rules of Order or otherwise.

3) The vote of August 2, 1950, consisting of 29 *yes* votes, 14 *no* votes and one blank vote, did not constitute a two-thirds vote required by the provisions of Article K of the Constitution and By-Laws of respondent associations.

II

That the action of the President of the Grand Lodge, purporting to modify the decision of the Local Lodge and impose a penalty of a \$500 fine and an apology, was not in accordance with the mandatory provisions of the Constitutions and By-Laws of the respondent associations in that

1) The only penalty provided for the offense with which petitioner was charged in the said Constitutions and By-Laws is the penalty of fine or expulsion or both.

2) Without prior authorization by the Executive Council no fine in excess \$50 is authorized by said Constitutions and By-Laws.

3) The only proper action that could have been taken by the said President of the Grand Lodge as an appellate tribunal was to reverse the Local Lodge upon the ground that prescribed constitutional procedures had not been followed.

III

That the action of the Executive Committee of respondent Grand Lodge purporting to affirm the decision of the President of the Grand Lodge was void and illegal for the same reasons as those assigned above with regard to the decision of the President of the Grand Lodge.

IV

That petitioner's failure to pursue further appellate remedies within the respondent associations is excused by (1) the associations' violations of their Constitutions and By-Laws, and (2) no adequate remedy by further appeal was available to petitioner by reason of the requirement that before further appeals could be prosecuted the penalty imposed, to wit, payment of the \$500 fine and apologizing to the respondent Truax must be executed by petitioner.

[fol. 52]

V

That by reason of the purported expulsion of petitioner by respondents, and each of them, petitioner sustained wage

loss in the sum of \$6,800 up to the date of his incapacitating illness. That unless and until he is restored to his rights and privileges in the respondent associations and reinstated to membership therein, he may suffer further damages by way of wage loss and otherwise, and this Court has continuing jurisdiction to award such further damages as may in the future be suffered by petitioner until he is actually restored and reinstated as aforesaid.

VI

That by reason of the purported expulsion of petitioner by respondents, and each of them, the petitioner has suffered grievous physical and mental pain and suffering, humiliation, anxiety and degradation. That the sum of \$2500 is adequate compensation therefore, up to the date of judgment herein, and this Court has continuing jurisdiction to award such further damages as may in the future be suffered by petitioner until he is actually restored and reinstated as aforesaid.

VII

That there was no evidence of malice or fraud on the part of respondents, and petitioner is not entitled to exemplary damages.

[fol. 53]

VIII

That petitioner has no speedy and adequate remedy at law, and is entitled to a writ of mandate directed to the respondents, and each of them, requiring that petitioner be forthwith restored to all of his rights and privileges in the respondent associations and to reinstatement as a member in good standing thereof, without payment of any fine or the statement of apology to the respondent Truax or any other person.

IX

Petitioner is entitled to a judgment against respondents, and each of them, for damages in the sum of \$6,800 for lost wages, plus \$2,500 as damages for mental and physical pain, suffering, anxiety, humiliation and degradation, for

his necessary costs expended in this action, and for the writ of mandate as aforesaid.

Let judgment be entered accordingly.

Dated: *July 29, 1954* .

/s/ John B. Molinari, Judge of the Superior Court.

[fol. 54]

[File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
MINUTE ORDER SETTLING AND APPROVING FINDINGS OF
FACT—*Jul. 29, 1954*

In this cause, the Court ordered findings of fact settled and approved.

[fol. 55]

[File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
JUDGMENT—*July 29, 1954*

The above-entitled cause came on for trial before the Court sitting without a jury on the 25th day of August, 1953, and again on the 3rd day of February, 1954, and evidence having been received and memoranda of law having been thereafter submitted to the Court and the cause submitted, and the Court having issued its memorandum of decision and having heretofore made and caused to be filed herein its written findings of fact and conclusions of law, and being fully advised:

Wherefore, by reason of the law and the findings of fact aforesaid, it is ordered, adjudged and decreed that petitioner have and recover from the respondents, and each of them, the sum of Sixty-Eight Hundred Dollars (\$6,800) as damages for lost wages, and the sum of Twenty-Five Hundred Dollars (\$2,500) as damages for grievous physical and mental pain and suffering, humiliation, anxiety and degradation, with interest thereon at the rate of seven (7) per centum per annum from the date hereof until paid,

[fol. 56] together with petitioner's costs and disbursements incurred in said action amounting to the sum of \$.....

It is further ordered that a peremptory writ of mandate issue forthwith to respondents, and each of them, directing them to forthwith restore petitioner to all his rights and privileges in the respondent associations and to forthwith reinstate petitioner as a member in good standing thereof, without payment of any fine or the statement of any apology or other condition.

It is further ordered that this Court retains continuing jurisdiction of this cause for the purpose of awarding additional damages or making further orders herein until this judgment and the said peremptory writ of mandate shall have been fully complied with.

Dated: July 29, 1954.

/s/ John B. Molinari, Judge of the Superior Court.

[fol. 57] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

NOTICE OF ENTRY OF JUDGMENT—July 30, 1954

To the respondents above named and to Messrs. Phoenix and Kennedy, their counsel:

You will each please take notice that on July 29, 1954, the Hon. John B. Molinari, Judge of the above-entitled Court, made and caused to be filed and entered herein written findings of fact and conclusions of law, and on said date judgment was entered herein in favor of petitioner Marcos Gonzales and against respondents.

Dated: July 30, 1954.

Gladstein, Andersen & Leonard, by /s/ Lloyd E. McMurray, Attorneys for Petitioner.

[fol. 58] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

PEREMPTORY WRIT OF MANDATE—July 29, 1954

TO: INTERNATIONAL ASSOCIATION OF MACHINISTS, an unincorporated association; CHARLES TRUAX, THOMAS E. McSHANE, and A. C. McGRAW, as International Representatives thereof;

INTERNATIONAL ASSOCIATION OF MACHINISTS, LOCAL LODGE No. 68, an unincorporated association; ROBERT ROLLER, as President of said Local Lodge; REESE CONTE, as Secretary of said Local Lodge; EDWARD PECK, as Treasurer of said Local Lodge; and their successors or assigns, if any:

In the above-entitled matter, petitioner herein having filed his duly verified petition for writ of mandate, and an alternative writ of mandate and order to show cause having issued herein, and, upon the hearing of said order to show cause so issued in connection with said alternative writ of mandate in the above-entitled matter, it appearing to the above-entitled Court that a peremptory writ of mandate should issue in the premises and that said petitioner has no other plain, speedy, or adequate remedy in the ordinary course of law;

Now, therefore, You, the said International Association of Machinists, Charles Truax, Thomas E. McShane, A. C. [fol. 59] McGraw, International Association of Machinists, Local Lodge No. 68. Robert Roller, Reese Conte and Edward Peck, and any successors or assigns of the foregoing, are hereby commanded to restore to Marcos Gonzales, petitioner herein, forthwith, all of his rights and privileges in the said International Association of Machinists and International Association of Machinists, Local Lodge No. 68, and reinstate said petitioner as a member in good standing thereof without payment of any fine or the statement of any apology to the respondent Truax or to any other person.

Witness the Honorable John B. Molinari, Judge of the Superior Court of the State of California, in and for the City and County of San Francisco.

Attest my hand and the seal of said Court, this 29th day of *July*, 1954.

/s/ Martin Mongan, Clerk, /s/ by E. Wall, Deputy Clerk.

(SEAL)

[fol. A] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT 16.

No. 423,147

HON. JOHN B. MOLINARI, Judge.

MARCOS GONZALEZ; Petitioner,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, an unincorporated association; CHARLES TRUAX, individually and as International Representative thereof; THOMAS E. McSHANE and A. C. McGRAW, as International Representatives thereof; INTERNATIONAL ASSOCIATION OF MACHINISTS, LOCAL LODGE No. 68, an unincorporated association; ROBERT ROLLER, as president of said Local Lodge; REESE CONTE, as Secretary of said Local Lodge; EDWARD PECK, as Treasurer of said Local Lodge; FIRST DOE, SECOND DOE, THIRD DOE, FOURTH DOE AND FIFTH DOE, Respondents.

Reporter's Transcript of Proceedings

APPEARANCES:

For the Petitioner:

Messrs. Gladstein, Andersen & Leonard, 240 Montgomery Street, San Francisco, Calif., by Lloyd E. McMurray, Esq.

For the Respondents: Messrs. Phoenix & Kennedy, 2395 Broadway, Redwood City, Calif., by Eugene K. Kennedy, Esq.

[fol. 1]

August 25, 1953, 10:00 A.M.

The Court: All right, Counsel, ready to proceed?

Mr. McMurray: Yes, your Honor.

Mr. Kennedy: Yes, your Honor.

OPENING STATEMENT BY MR. McMURRAY

Mr. McMurray: Your Honor, by way of opening statement, I will try to clarify and clearly state the issues, and what Plaintiff intends to show.

This is an action for a Writ of Mandate seeking an order of the Court that Plaintiff be reinstated in the International Association of Machinists, Local Lodge No. 68, and also seeking damages for his lost wages during the period when he has been unable to work because of his wrongful expulsion.

The parties are the Plaintiff Marcos Gonzales, and the International Association of Machinists, an unincorporated association; Charles Truax, individually and as International Representative thereof; Thomas E. McShane and A. C. McGraw, as international Representatives thereof. Since the Complaint was filed, there have been new officers elected, but I understand it to be the position of the Respondents that the Lodge is taking this from the answer that has been filed, that the Lodge—Local Lodge is answering, and that the fact that the named Defendants, the named Respondents are sued in the representative capacity. The change will make no difference in the possible outcome of the action.

[fol. 2] The case arises out of a matter that goes back to 1948, your Honor, and we will show by way of background in order to enable the Court to understand the situation very briefly, that in 1948, or prior to 1948, one of the Defendants who has not been served and as to which the case is not at issue, Charles Truax, was appointed as the International Representative to take control of the Local Lodge. He was appointed by the International President and the autonomy of the Local Lodge was terminated; the affairs of the Lodge were placed entirely in the hands of Truax. That under Truax's control a division arose within the Lodge,

many members of the Lodge being opposed to Truax's policies, and some members of the Lodge being in favor of Truax's policies. That among those who were opposed to Truax was the plaintiff Marcos Gonzales.

In October, 1948, on October 5th, the Plaintiff had occasion to question one Kenneth Nelson in a meeting of the Lodge as to his right to be in the Lodge, or to be in the meeting. That he was told that this Nelson had been brought into the Lodge by Truax, and then at a subsequent meeting he was beaten, or immediately after the subsequent meeting, on October 28th, the Plaintiff was beaten by Nelson and some others, and severely injured.

As a result of that beating, he filed a suit against Nelson and Truax, and in that action it was tried in the Superior Court here, a judgment of non suit was returned against [fol. 3] Truax and a verdict of \$20,000 which was reduced to \$10,000—was returned against Nelson, and in favor of the Plaintiff Gonzales. When those cases had been tried—rather several trials had been held, and the final result was then a \$10,000 judgment in favor of the Plaintiff against Nelson, the Truax—the Grand Lodge Representative who then still controlled the Local, filed charges against the Plaintiff under the rules and regulations governing the Local and the International Lodges. The charge alleged that in brief, that the Plaintiff Marcos Gonzales had made false and malicious statements about an officer of the Lodge, to wit, Truax, and brought the Lodge into disrepute. These charges were tried before a committee composed almost entirely of persons who were known to be and who were in fact members of what we call the Truax clique, and opposed to Gonzales, and other people who agreed with Gonzales about the policies of the union, one of the members of the trial committee was a man who had run against Gonzales in election for an office in the Local Lodge, another one was one of them who had assisted Nelson in the bodily assault against Gonzales, and another one was one who testified—two others were among those who testified on behalf of Nelson at the trial of the assault and battery case.

The evidence introduced at the hearing consisted of a copy of the Complaint together with a statement to which Mr. Gonzales stipulated that the result was a judgment of

[fol. 4] non suit as to the Defendant Truax. He was an instigator in the trial within the union, and the testimony of Nelson that he had not been directed to beat up Gonzales by Truax, the Trial Committee returned, we will show, a decision against Gonzales and recommended his expulsion from the union.

In accordance with the regular procedure set forth in the Constitution of the International and the Local, the recommendations of the Trial Committee was voted upon by a secret ballot, and the decision was against the recommendation of the Trial Committee. After the meeting as Gonzales was leaving the hall with some friends, Nelson and several other persons whom he did not recognize, attempted to beat him up again and followed him onto a bus. One of Gonzales' friends told the bus driver to hold the bus while he got a policeman. He got a policeman and the policeman took Nelson and the other men who had been chasing Gonzales off the bus, and the policeman escorted Gonzales downtown where he was safe.

At the following meeting, Gonzales and his friends did not appear because they were afraid they'd be beaten up, and at that meeting a motion was made by the—one of the members of the trial committee, to reconsider the vote that had been taken on the Trial Committee's action, recommendation at the previous meeting. At this meeting, the motion to reconsider was carried, a new vote was had, and the result was in favor of the Trial Committee's recommendation, ordering Gonzales to be expelled from the Lodge. However, [fol. 5] in the meantime, Truax had taken an appeal from the decision of the Local Lodge which had at first rejected the Trial Committee's recommendation; he had taken an appeal in accordance with the rules of the Lodge, to the International President. After the Lodge, the Local Lodge had reconsidered the matter and voted to expel Gonzales, this appeal was withdrawn and Gonzales appealed. The International President sustained the decision, but modified it, and held in a written opinion which will be introduced, that while the charge was sustained by the evidence, the punishment was too severe; that it should be reduced to a fine of \$500.

He imposed this punishment, and an appeal was taken by Gonzales to the Executive Council in accordance with the rules of the order. The Executive Council, however, affirmed the decision of the President. One further appeal would lie under the rules of the order, and that is to the membership through a referendum vote, but this appeal was not taken because of the violation from the beginning to the end of the procedure of the rules of the order, as set forth in the Constitution and by laws.

After the decision against Gonzales, the local union refused at first to accept his dues. It was then told by the International President, that during the pendency of appeal the Plaintiff had a right to pay his dues, and the dues were accepted for a time, but finally when the \$500 fine had been imposed, the Local Lodge informed the Plaintiff that [fol. 6] it would no longer accept his dues until he paid his fine. Coupled with the fine, I should say, was that he apologize to Truax. The Plaintiff has refused either to apologize to Truax or to pay the fine. The Plaintiff, after he was unable to pay his Local Lodge, sought his work as he has been doing for about fifteen years as a marine machinist in San Francisco. As a marine machinist, his work is primarily repair work on vessels, ocean going vessels, that come into repair yards in the area. As a marine machinist, he earns not less than a hundred dollars a week and particularly since marine work is frequently work that has to be done in a great hurry, men are kept on long periods on the job, and they receive overtime, double time, and large sums in payment for their work. They earn frequently far in excess of a hundred dollars per week.

Since March of 1952, however, the Plaintiff has been unable to obtain any work because everytime he applies for a job, he is told to go to the hall to get a clearance, and when he goes to the Local Lodge hall he is told that no clearance can be given until he pays the fine and apologizes to Truax, and is reinstated as a member; therefore, he has been unable to support himself by his earnings from March of 1952 to the present date; and the Plaintiff will ask damages to compensate him for his lost wages during that period.

The Plaintiff's theory is that the expulsion from the Local Lodge was illegal, in a number of respects. First of all, that the Trial Committee was a biased and unfair [fol. 7] Trial Committee, and was decidedly appointed to be such. Secondly, that the charges themselves were based upon the filing of a Complaint in the Superior Court, and upon the rules of that action, that this did not constitute an offense under the laws of the Lodge, that no other evidence was introduced which purported to justify the expulsion but the copy of the Complaint and the stipulation regarding the results of the Trial in the Superior Court. Third, that the decision of the local union, when it first voted against the Trial Committee's recommendation was final, that no reconsideration could properly be had. Fourth, that if any reconsideration could be had, under the laws of the Local Lodge, it was improperly done, and the Plaintiff was denied the right to have the proper procedure followed. Next, that the fine imposed by the International President was in violation of the rules of the order which provide that no fine of more than \$50 may be imposed without prior concurrence by the Executive Council of the International Lodge; but here, the fine was first imposed by the International President and later this fine was concurred in by the Executive Council. So that the procedure followed was not the procedure set forth in the rules of the order, and under a well established rule, the Plaintiff was denied his property right in those rules, and his right to have those rules followed; and furthermore, since he was expelled because of what he said in bringing an action against Truax and Nelson, he was deprived of his right of [fol. 8] free speech, and his right to resort to the courts of the State of California for regress when he has been wronged.

And that, I think, outlines our case, fully, your Honor.

Mr. Kennedy: Your Honor, unless there is a desire indicated on your part, the Defendant would rather reserve his opening statement.

The Court: All right, proceed with your evidence.

Mr. McMurray: Mr. Gonzales, will you take the stand, please.

MARCOS GONZALES, the Petitioner, called as a witness in his own behalf, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

The Clerk: What is your name?

The Witness: Marcos Gonzales.

The Clerk: Where do you live?

The Witness: 2032 Palou Avenue.

Direct examination.

By Mr. McMurray:

Q. Mr. Gonzales, is your first name spelled M-a-r-c-o-s or u-s (Spelling)?

A. C-o-s (Spelling).

Q. You are the Plaintiff in this case, are you not, Mr. Gonzales?

A. Yes.

Q. And you are, you have been a member of the International Association of Machinists and of Local Lodge 68, [fol. 9] in San Francisco, have you?

A. Yes.

Q. How long have you been a machinist?

A. Oh, about—I have been a machinist since 1914.

Q. And how long have you been a marine machinist?

A. Oh, about fifteen or eighteen years; that's counting my sea experience, going to sea.

Q. And how long have you been working as a marine machinist in San Francisco? A. Twelve years.

Q. Now, during that period in San Francisco, working as a marine machinist, how did you obtain employment, through what medium or agency?

A. Through the office clearance; that is, at the union hall.

Q. The union hall?

A. Yes.

Q. Where is that hall?

A. At 10th and Capp Street, labor temple.

Q. And you held a book in that union, did you?

A. Yes, sir.

Q. As a member of the union?

A. Yes, sir.

Q. Now, about 1946, was there some change in the position of that union with regard to the autonomy?

A. Yes, the Grand Lodge appointed one of the Grand Lodge representatives to take the Lodge over. We were just over a strike at that time. We had gone on strike in '45, around October, and the strike ended sometime in March, 1946.

Q. And who was the representative appointed to take over the union?

A. Charles Truax.

[fol. 10] Q. Now, after Truax was appointed to take over the union, were you active in the affairs of the Union?

A. Yes, sir, I had been a shop steward for the union for quite some time prior to the Lodge being taken over by the Grand Lodge.

Q. And after it was taken over by the Grand Lodge, did you continue to be active in the affairs of the union, the local?

A. Yes, sir.

Q. Did you hold any office in the local union?

A. Well, I was a shop steward right along, shop steward and—

Q. Were you a member of any committee?

A. I was on the Policy Committee.

Q. What was the Policy Committee's function?

A. That was examining all new applicants that come into the local.

Q. Examining them in what respect?

A. As to their qualifications as machinists.

Q. And were you a trustee of the Local Lodge?

A. I was elected a trustee in '49.

Q. In 1949?

A. Yes, '49, I think; I am not quite sure, but I believe it was about 1949.

Q. And did you regularly attend the meetings of the Local Lodge?

A. I did, Executive Board meetings and also I attended—

Q. Were you a member of the Executive Board?

A. Yes, sir.

[fol. 11] Q. When were you a member of the Executive Board?

A. In '49.

Q. Now, in 1948, in October of that year, did you have occasion to examine the applications for membership of certain persons seeking to become members of the Local Lodge?

A. Yes.

Q. And among those was one, Nelson?

A. Yes.

Q. What was his first name?

A. Kenneth.

Q. Kenneth Nelson?

A. Yes.

Q. Now, with regard to October 4th, 1948, did you examine his application at that time?

A. Yes, sir.

Q. And did you speak to him about his qualifications?

A. Yes, sir.

Mr. Kennedy: If your Honor please, if I may, I am going to object to any further interrogation with respect to Nelson, as I can't see where it would have any bearing on the issues as framed by the Pleadings. The issues, as I see them, is whether or not Plaintiff was given a fair trial and what damages he suffered, if any. Now, I'd like to reiterate, if I may, I have raised this point again in the motion to strike which I have filed, we contended that the allegation concerning Kenneth Nelson should be stricken, inasmuch as it came out of the trial, of the civil trial of Kenneth Nelson, has no demonstrative bearing on the issues at all, that I am aware of, and for that reason I would like [fol. 12] to state that I am objecting to any interrogation with respect to the Plaintiff and his activities in connection with Kenneth Nelson.

The Court: I understand that the basis for the original charges, as contended by the Petitioner in this case, was the Complaint filed in the Superior Court against Nelson and Truax, made certain allegations about an assault, and that Nelson was apparently the agent or instigated by Truax, and that was the basis of these proceedings. Isn't that your contention?

Mr. McMurray: Yes, your Honor.

Mr. Kennedy: My understanding, if I may just say this final thing, was that the charges were based on allegations contained in the Complaint rather than the Complaint itself, and I think that would indicate the immateriality of Nelson's part in the picture; however, that may be in controversy, and if so, why it is one of the issues.

The Court: I will overrule the objection at this time.

By Mr. McMurray:

Q. You say that you did examine Kenneth Nelson as to his qualifications as a machinist, is that right?

A. Yes.

Q. And in what capacity were you acting when you examined him?

A. Policy Committee.

Q. As a member of the Policy Committee?

A. Yes.

Q. And as a member of the Policy Committee, did you [fol. 13] have the duty and the authority to make some recommendations with regard to applicants whom you examined?

A. Yes, sir.

Q. And did you make any recommendation with regard to Nelson?

A. I objected to taking him in, because he didn't—well, in the first place, we had too many helpers on the program; next, he wasn't competent; and next, I knew the purpose he was coming in the union for.

Q. And you decided after examining him that he was not competent?

A. Yes.

Q. And that you knew for what purpose he was coming into the union, is that right?

A. Yes.

Q. And did you issue to him any sort of a membership book or any other sign of membership in the union?

A. No, sir.

Q. And was that your function to issue membership cards to applicants whom you found qualified?

A. No, I made my recommendations on the applications,

and thirty day probation—you had to wait thirty days probation and if they qualified, they were then given their books in good standing. In other words, they come back, and they were initiated thirty days after.

Q. You made a recommendation against his being admitted, is that right?

A. Yes, but I was overruled. They put it over anyway. That is the Business Agent, and the Dispatcher said, "well, Charlie Truax wanted him in and that is all."

[fol. 14] Mr. Kennedy: Just a minute, I move to strike that as hearsay.

The Court: It is stricken.

By Mr. McMurray:

Q. Then the next day, on October 5th, 1948, was there a meeting of the Local Lodge?

A. Yes, sir.

Q. And did you attend that meeting?

A. Yes, sir.

Q. And did Kenneth Nelson attend that meeting?

A. Yes, sir.

Q. Did you have some conversation with him?

A. After the meeting I did.

Q. And what was the subject of your conversation?

A. Well, my attention was called by my colleague, Ed Peck—

Mr. Kennedy: Well, excuse me again, I am forced to object to these conversations that are not binding on any of the Defendants here, your Honor, outside of their presence. I don't think there is any foundation shown, at least that it was—

The Court: Sustained.

By Mr. McMurray:

Q. The question was, what was the subject of your conversation, what were you talking about?

A. Who brought him in the union or who gave him the book.

Mr. Kennedy: I object to that as irrelevant, under the posture of the record, the subject matter. It has no bearing, [fol. 15] if the conversation can't be shown.

The Court: Well, can't we—is it necessary to go into the background of the altercation between Nelson and this man? Because that is probably a matter that neither one of you have any dispute about, that that occurred.

Mr. McMurray: I don't intend to go into it at any length at all, your Honor. I just wanted the bare bones of the background in here.

Q. Then on October 20th, 1948, Mr. Gonzales, did anything unusual occur?

A. Yes, quite a disorder in the union that was caused by Charlie Truax.

Mr. Kennedy: Just a minute, I move to strike that as a conclusion.

The Court: It is stricken.

By Mr. McMurray:

Q. Was there a meeting of the union on that day?

A. Yes, sir.

Q. And did anything unusual happen to you?

A. Yes.

Q. What was that?

A. I was assaulted.

Q. And by whom were you assaulted?

A. Kenneth Nelson.

Q. Now, as a result of that assault, and other matters, did you consult an attorney sometime later?

A. Yes.

Q. And that attorney was Herbert Resner, was he not?

A. That's right.

[fol. 16] Q. And Mr. Resner filed a suit on your behalf in March of 1949, did he?

A. Yes.

Q. And that suit was filed in the Superior Court in San Francisco here, was it not?

A. Yes.

Q. Now, following the trial of that action, you were ac-

cused by Charles Truax in a—by a written accusation filed against you in the local lodge, is that correct?

A. Yes.

Q. And a trial Committee was appointed to hear the charges against you, is that so?

A. Yes, sir.

Q. Now then, do you remember who was the President of that Trial Committee or the Chairman of that Trial Committee?

A. Yes, Ralph Pointer was the Chairman.

Q. By whom was he appointed?

A. By the President.

Q. And who was the President?

A. Fiber.

Q. Fiber, do you know his first name?

A. I forgot his first name.

Q. Now, Ralph Pointer was a member of the Lodge, I take it?

A. Yes.

Q. And did you know him?

A. Yes, I knew him well.

Q. And had he been engaged in any activity in which you had also been engaged in the Local Lodge?

A. Oh, yes, he was past president.

Q. Past president of the Lodge?

A. Yes.

[fol. 17] Q. And in what activity had you been engaged in, that he had also been engaged in, in the Lodge?

A. Well, he was one that testified against me in court.

Q. He had testified against you, you say?

A. Yes.

Q. In the trial, that is, of the action against Truax and Nelson, is that right?

A. That's right.

Q. And who else was a member of that committee?

A. Niles, Speed.

Q. That is N-i-l-e-s, S-p-e-e-d (Spelling)?

A. Yes, Niles Speed.

Q. Niles Speed. Had he testified in the case against Nelson and Truax?

A. Yes.

Q. In whose behalf did he testify?

A. Nelson's.

Q. And who else was a member of the Trial Committee?

A. Greenfield—Marcus Greenfield.

Q. And who else?

A. Gino Belluomini.

Q. How do you spell that?

A. That is Gino—

Q. G-i-n-o (Spelling) and B-e-l-l-u-o-m-i-n-i (Spelling).

What about Mr. Belluomini, did you know him?

A. Yes.

Q. How did you know him?

A. Well, he was—we were both running for election as trustees.

Q. And you were opponents in that election, were you?

[fol. 18] A. Yes.

Q. And who won the election?

A. I won the election.

Q. And Ralph—Rex Rener, was he a member of the Trial Committee also? A. Yes, sir.

Q. Did you know him?

A. I had seen him in the meetings.

The Court: What is his name?

The Witness: Rex Rener.

Mr. McMurray: R-e-n-n-e-r (Spelling). Now, the trial was held on the charges filed by Truax on July 7th, 1950, in the evening, is that correct?

A. That's right.

Q. And at that trial was a stenographic record kept of the testimony given?

A. Yes.

Mr. McMurray: I think it will be stipulated, your Honor, that this document which I am offering in evidence is the stenographic record, or report of the trial we have just been hearing about.

The Court: All right, it's admitted in evidence then as Petitioner's No. 1.

The Clerk: Plaintiff's 1.

(Whereupon, the stenographic record referred to was marked Petitioner's Exhibit No. 1 and admitted in evidence.)

By Mr. McMurray:

Q. Now, Mr. Gonzales, during the course of that trial, Charles Truax appeared as Plaintiff against you, is that [fol. 19] correct?

A. Yes.

Q. And Kenneth Nelson appeared as a witness on his behalf, is that right?

A. Yes.

Q. And during that trial you were questioned with regard to your reason for alleging in the action filed in the Superior Court that—

The Court: Counsel, may I interrupt?

Mr. McMurray: Yes.

The Court: Was this before the trial of this action in the Superior Court?

Mr. McMurray: It was after the trial.

The Court: After that trial? All right.

Mr. McMurray: After that had been completed, you were asked by Charles Truax as to the basis for your allegations in the Complaint that Nelson and Truax had assaulted you, is that correct?

A. Yes.

Q. And all of the evidence that was before the—or all the evidence introduced in the trial was introduced there on that one evening, was it not?

A. That's right.

Q. Now, Mr. Gonzales, after the trial proper was concluded, then the trial committee retired to consider its decision, is that right?

A. Correct.

Q. And a report or determination of the Trial Committee was returned to the local union, is that correct?

A. That's correct.

Q. The local lodge has regular meetings does it not?
[fol. 20] A. Yes.

Q. And how often are they held?

A. It is twice a month.

Q. Twice a month?

A. Yes.

Q. And regular minutes are kept of the meetings and what occurs in the meetings, are they?

A. Yes, sir.

Mr. McMurray: I think, your Honor, it will be stipulated that the documents I hold here are photostatic copies of the minutes of the regular meeting of the Lodge, Lodge 68, IA of M on July 19th, 1950. I will offer that as Plaintiff's next in order.

The Court: Plaintiff's 2, it will be so admitted in evidence.

Mr. McMurray: And I'd like to call the Court's attention to a particular portion of that exhibit, your Honor, and to read this portion of it, portion is headed:

"Committee Reports.

"Brother Poynor read report of the Trial Committee, appointed to hear charges preferred against Brother Marcos Gonzales by Brother Charles Truax.

"The verdict of the Trial Committee was 'guilty as charged' in violation of Article XXV Section 1, of the Grand Lodge Constitution.

"In accordance with the Grand Lodge Constitution, [fol. 21] the Chair appointed a balloting Committee as follows—Brothers Gus Miller, Manuel Maderios, and William Davis.

"Ballots were distributed, cast and counted with results as follows. In favor of sustaining verdict of the Committee, 31"—which has evidently been placed there after an erasure of something which was there prior to that, then—

"... against, 43, 3 blanks.

"Count of house showed 77 present."

Your Honor may want to examine that. I don't think it is particularly significant, but it is evidence that there was some sort of an erasure.

Q. Were you present at that first meeting?

A. Second meeting, the vote was taken.

Q. Second meeting the vote was taken?

A. Yes, it was taken.

Q. Did anything unusual occur on that evening after the meeting?

A. Yes.

Q. What was that?

A. Well, no sooner I got to the door and I was chased downstairs, and not only me, me and a friend of mine, we jumped on the bus.

Q. Who chased you?

A. Three men.

Q. Did you know any of them?

A. Yes, I recognized one of them.

Q. Who was that?

A. Kenneth Nelson.

[fol. 22] Q. When you say you were chased, what do you mean?

A. Well, they run after me, they want to beat me up on the street, because prior to that, this fellow jumped up in the meeting when I had protested—they wouldn't let me get up, and explain why I had claimed the Trial Committee was prejudiced, and they wouldn't let me say nothing.

Mr. Kennedy: May I interrupt you please, Mr. Gonzales? Your Honor, unless Counsel states that he is going to connect this up with some of the Respondents here, I want to renew my motion to strike.

Mr. McMurray: I am sure—I couldn't understand all that Counsel said, connect it up with what?

Mr. Kennedy: One of the Respondents in this action. I want to move to strike the testimony.

Mr. McMurray: Oh, it will be connected up with the Respondents, International Association and Local Lodge 68, your Honor.

The Court: Well, nothing transpired, I take it, other than this particular time?

Mr. McMurray: Except that an attempt was made to commit an assault on the Plaintiff.

Q. Were you actually struck, Mr. Gonzales?

A. He made a pass at me right in the meeting.

Q. Who did?

A. Kenneth Nelson.

Q. And then after the meeting he chased you down the stairs, is that right?

A. Yes.

[fol. 23] Q. Did he actually strike you?

A. No, well, made a swing, but he didn't hit me, but then thereafter, him and a few other fellows went after me, and I jumped on the bus for safety, and Harry Shear, went and called the policeman, and told the bus driver to hold the bus, and he got a policeman. The policeman came down the street, on the bus, took us off.

Q. A policeman got on the bus and took who off?

A. Kenneth Nelson and the other fellows off the bus.

Q. The other men that were with Kenneth Nelson?

A. Yes.

Q. What did you do then?

A. We asked for some protection so he walked me up the other block and there was two officers there and we asked one of the officers if he would ride down with us in a taxi, put us to safety, because there was a machine there with a few other guys that I was kind of leery that might trail us. So he rode down as far as Market Street, the police officer got off, and from there I got off and the other fellow kept going in the taxi.

Q. And after that did you attend the meeting held on August 12th, rather August 2nd, 1950?

A. No, sir.

Q. Why didn't you attend that meeting?

Mr. Kennedy: Object, your Honor, it is immaterial.

Mr. McMurray: I think it is material, your Honor. There [fol. 24] may be a claim that no objection was made to the procedure that was followed at the meeting of August 2nd, and I think it is proper for us to show—

The Court: The objection is overruled.

By Mr. McMurray:

Q. Why didn't you attend the meeting of August 2nd?

A. I was afraid.

Q. What were you afraid of?

A. I was afraid of being assaulted.

Mr. McMurray: Now, I have here, your Honor, what I believe Counsel will stipulate is a photostatic copy of the minutes of the regular meeting at Lodge 68, on August 2nd,

1950, and I will offer this in evidence as Plaintiff's Exhibit No. 3.

The Court: It is admitted in evidence as Plaintiff's Exhibit 3.

(Whereupon, photostatic copy of minutes referred to was marked Petitioner's Exhibit No. 3 and admitted in evidence.)

Mr. McMurray: I'd like to direct your Honor's attention to a certain portion of that exhibit. This appears in the minutes, Plaintiff's Exhibit 3, your Honor:

"Moved and seconded that Lodge rescind its action of July 19th, 1950, taken on report of the Trial Committee which acted on the case of Brother Marcos Gonzales.

"Standing vote showed 38 yes, 4 no.
[fol. 25] "Carrying the motion.

"Moved and seconded that the verdict of guilty as charged in the report of the Trial Committee in the case of Brother Marcos Gonzales, made to the Lodge at the regular meeting of July 19th, 1950, be concurred in.

"Questions regarding evidence at the trial were asked of members of the Trial Committee and satisfactorily answered.

"Chair appointed balloting committee of Brothers Bringham, Gutfeld, and Miller.

"Secret ballot taken with count showing 31 yes, 12 no, 2 blanks.

"Thereby concurring in Trial Committee's verdict of guilty as charged.

"Brother Poyner stated that the recommendation of the Trial Committee was that Brother Marcos Gonzales be expelled from membership in the International Association of Machinists.

"Chair appointed ballot committee of Brothers Bringham, Gutfeld, and Miller.

"Secret ballot taken with count showing 29 yes, 14 no, 1 blank. House count 44. Thereby concurring in the recommendation of the Trial Committee that Gonzales be expelled from the IA of M."

Are we going to take a break this morning?
[fol. 26] The Court: Maybe this would be a good time to do it. We will have a recess now.

(Whereupon, a short recess was taken.)

MARCOS GONZALES (Resuming).

Direct examination (Continued).

By Mr. McMurray:

Q. Mr. Gonzales, you were notified that your expulsion from the union had been voted by the membership, were you?

A. Yes.

Q. And you then consulted your attorney, Mr. Resner, did you?

A. Yes.

Q. And at your request, did he prepare and send a letter to Mr. A. J. Hayes, the International President of the International Association of Machinists?

A. Yes, sir.

Q. I show you a copy of a letter dated August 16th, 1950, signed by Herbert Resner, and ask you if that is a copy of the letter which he sent, which he gave to you?

A. Yes.

Mr. McMurray: I will offer that in evidence as Plaintiff's Exhibit next in order, your Honor, and state the purpose of the offer; in this letter Mr. Resner said among other things:

"Under any circumstances it seems to me that there is no justification at all and no support in your Constitution for a second action of the Union on August 2nd, after Mr. Gonzales was vindicated on July 19th."

[fol. 27] And the purpose of this is to show that in the appeal filed by the Plaintiff, in the union, the legality of the vote on August 2nd, was raised by him.

Mr. Kennedy: Are you through, Counsel?

Mr. McMurray: Yes.

Mr. Kennedy: Your Honor, I would like to note an objection to that document on these grounds: It contains a large amount of conclusions based on hearsay, no doubt, which we regard as prejudicial and more than that we feel that it is immaterial because the records will show, and there are available here, other documents showing that Plaintiff did appeal his—the result of the local Lodge action, and we feel that is the only materiality.

The Court: You are not contending, Counsel, that this letter is any part of any appeal procedure set up by the bylaws of the rules or the Constitution of any of these unions?

Mr. McMurray: No, perhaps the materiality of it will appear a little better from the next exhibit.

The Court: Is your only purpose to show that Mr. Gonzales did protest to the International, the matter of the legality of the reconsideration?

Mr. McMurray: That is the only purpose.

The Court: Perhaps without putting the letter in, Counsel will stipulate that he did protest, for whatever it might [fol. 28] be worth.

Mr. Kennedy: Yes, your Honor, except that we do have available here, and I believe Counsel has too, contemporaneous documents showing an appeal and a protest, and for that reason I feel that it would be prejudicial to introduce a document of that nature.

The Court: Well I think perhaps your objection is well taken.

Mr. McMurray: As I understand it, it is stipulated that the legality of the action taken on July 2nd, was raised in the appeal by Mr. Gonzales.

Mr. Kennedy: Yes, we will stipulate to that.

The Court: If you want, we will mark this for the time being as Plaintiff's Exhibit next in order for identification.

Mr. McMurray: Perhaps it should be.

The Court: And if it should be material, you will renew the offer.

The Clerk: Plaintiff's 4 for identification.

(Whereupon, the letter dated August 16, 1950, referred to, was marked Petitioner's Exhibit No. 4 for identification.)

Mr. McMurray: I will then offer, your Honor, a document dated November 13th, 1950, on the letter head of the International Association of Machinists, a hectographed document, I suppose it is, bearing the signature or purported signature of A. J. Hayes, international President; [fol. 29] there is no question, I take it, of the authenticity of this document, and this contains, your Honor, the decision of the International President on the appeal taken by Mr. Gonzales. It also is offered to show that an appeal was taken after July—after—wait a minute—I'll have to get these dates straight. I get them mixed up. After July 20th, an appeal was taken on July 22nd, by Charles Truax from the decision of July 20th, when the union voted against the recommendations of the Trial Committee and that this appeal was then dropped by Charles Truax when the reconsideration had taken place on August 2nd. It is offered, your Honor, for the decision appearing on the last page as follows:

"Although the evidence shows full guilt on the part of Brother Gonzales, resulting in harm to Brother Truax and the organization to which both the Plaintiff and Defendant belong, I am of the opinion that the decision of the Lodge to expell Defendant Gonzales from membership was too severe, and I hereby modify the penalty as follows: Defendant Gonzales shall pay \$500 fine to Lodge No. 68 and shall make a complete and appropriate apology to Brother Truax, furnishing a copy of such apology to this office. My decision in this case is based upon the entire record and would have been exactly the same regardless of the fact that the Lodge, at its meeting on August 2nd, 1950, reversed [fol. 30] the decision made on July 19th, as set forth in No. 4 above."

The Clerk: That is offered?

Mr. McMurray: That is offered.

The Court: All right, it is admitted in evidence as Plaintiff's Exhibit next in order.

The Clerk: Plaintiff's 5.

(Whereupon, letter dated November 13, 1950 referred to, was marked Petitioner's Exhibit No. 5 and admitted in evidence.)

The Clerk: This is a report, is that right, Counsel?

Mr. McMurray: Decision of the International President.

I next have a letter dated January 30th, 1951, ~~on~~ the letterhead of the International Association of Machinists, purportedly signed by Eric Peterson, General Secretary-Treasurer, which I will offer as Plaintiff's next exhibit, your Honor.

Mr. Kennedy: No objection.

The Court: It is admitted in evidence as Plaintiff's next—

The Clerk: Plaintiff's 6. That is what?

Mr. McMurray: A letter of January 30th.. I'd like to read this, your Honor. It is addressed to Mr. Marcos Gonzales, 2032 Palou Avenue, San Francisco, 24, California.

"Dear Sir: Please be referred to our letter of November [fol. 31] ber 29th, wherein we acknowledged your letter of November 16th, appealing the decision of the International President announced in his letter of November 13th, 1950, and suggesting that you submit in writing your reasons for appealing that decision.

"Inasmuch as you failed to supplement your letter of November 16th, the Executive Council, at its recent meeting, carefully appraised all of the facts as presented in the correspondence dealing with your case, and, after due deliberation, by unanimous action, voted to sustain the International President's decision.

"Accordingly, President Hayes' decision of November 13th, fining you \$500 becomes the decision of the Executive Counsel, and our records have been so indicated."

That is evidently an inadvertent slip in language.

The Court: Was there some appeal procedure provided within the local—

Mr. McMurray: All the appeal procedure was, that has been followed according to the evidence so far, to the President, international President, and then to the Executive Council.

I have next a letter of February 11th, 1952, which I will offer as Plaintiff's Exhibit No. 7. This is addressed to Mr. [fol. 32] Marcos Gonzales, and purports to be signed by

Reese Conte, Financial Secretary of Lodge No. 68, and it appears on the letterhead of San Francisco Lodge No. 68 IA of M, and it says:

"Dear Sir and Brother:

"This letter is to inform you that we can not continue to accept dues until the \$500 fine is paid to Lodge No. 68, and a complete and appropriate apology to Grand Lodge Representative Truax, furnishing a copy of such apology to International President's Office.

"This is in accordance with the decision rendered by International President A. J. Hayes on November 13th, 1950, and sustained by the Executive Council at the January 1951 meeting.

"With best wishes, I am, fraternally, Reese Conte."

The Court: It is admitted in evidence as Plaintiff's Exhibit next in order.

The Clerk: Plaintiff's 7.

(Whereupon, letter dated February 11, 1952, referred to, was marked Petitioner's Exhibit No. 7 and admitted in evidence.)

Mr. McMurray:

Q. Now, Mr. Gonzales, during the pendency of these appeals, you had been employed, had you?

A. Yes.

[fol. 33] Q. And you were working at your regular occupation as a marine machinist?

A. Yes.

Q. What were your earnings during the period in 1950, '51, and '52, when you were working as a marine machinist?

A. Well, they varied, because—oh, I was working for the General Electric Company—I averaged about \$140, \$150 a week.

Q. You were working as a marine machinist for the General Electric Company?

A. Yes.

Q. And was there—can you say what your usual earnings were per week?

A. Well, they were over a hundred dollars a week, be-

cause I couldn't very well establish the salary, because sometimes if I was working out at Fort Mason, a transport would come in, and you'd have to work two days straight, and anything over eight hours was double time, so in a short time you make close to \$200, day and a half or so.

Q. Is it fair to state that your earnings were nearly always at least \$100 per week?

A. Yes.

Q. And that they were frequently more than a hundred dollars, but less than \$200 per week?

A. Yes.

Q. Now, how long were you able to, or how long did you continue to work after February of 1952, when you were notified that your dues were no longer acceptable, and would no longer be accepted by the local union.

A. Oh, about four days, and I hurt myself on one of those tugs out at Pacific Ship Repair.

[fol. 34] Q. Had an industrial injury?

A. Yes.

Q. That disabled you for awhile, did it?

A. Yes.

Q. And when were you physically able to return to work?

A. March.

Q. March of 1952?

A. Yes, about March 4th or March 5th.

Q. And had you had a medical examination shortly before then?

A. Yes, I was given a release by Dr. Kilpatrick.

Q. Now, after March 4th, did you attempt to obtain employment as a marine machinist?

A. Yes.

Q. And were you successful?

A. No, sir.

Q. Have you been able to obtain any employment as a marine machinist from that day to the present time?

A. No, sir.

Mr. Kennedy: Excuse me, your Honor, I move to strike this on the grounds that the statement that he was unsuccessful is immaterial, unless it is shown prior what efforts were made to obtain employment; the mere statement that he was unsuccessful is meaningless unless—in itself.

Mr. McMurray: I am not attempting to put it all in by one question. We will go on.

The Court: All right, I will overrule the objection.

By Mr. McMurray:

Q. Now, did you apply to the local union for assignment [fol. 35] to a job as you had done before?

A. Yes.

Q. And to whom—to what individual did you apply?

A. Dispatcher, Barney O'Hara.

Q. What was his job?

A. Dispatching all work that come into the hall, all marine machinists; he had charge of the dispatching office.

Q. When you say work that came into the hall, what do you mean?

A. Well, all calls that come in from the outside.

Q. From the employers, you mean?

A. Yes.

Q. The ordinary practice was, there was the employers who needed machinists, would telephone the hall and ask that machinists be sent out to them, is that right?

A. That's right.

Q. And you applied to him in March of 1952, did you?

A. Yes.

Q. And what did he say?

A. Well, he couldn't dispatch me on account of the trouble I had with the organization.

Q. And did you apply to him on more than one occasion?

A. I applied regularly. I thought probably I'd get dispatched to some job that couldn't fill the bill because many a times they were calling for marine machinists and they didn't have enough to send out.

[fol. 36] Mr. Kennedy: I didn't get that.

(Pending answer read by the Reporter.)

By Mr. McMurray:

Q. So it was your action then, to apply to the dispatcher frequently?

A. Yes.

Q. Did you, as a matter of fact,—you stationed yourself

at the dispatch office, did you not, day after day on many days in March of 1952 and thereafter?

A. Yes, quite frequently I was up at the hall. Quite frequently I was up at the hall looking around to see whether I could find out whether they need machinists.

Q. Did you make any other attempts to find employment?

A. Oh, I went around a lot of shops that knew me. I'd come up to the Columbia Machine Company, Matson Navigation, and Mechanics Ship Repair, Triple A Machine Shop, and Wagner-Niehaus—in other words, I asked them if they needed the men to give me a ring. * * *

* * * * * * *

By Mr. McMurray:

Q. On these occasions when you went and applied to these various places that you have mentioned, to whom did you go? Was there some particular type of official that you went to?

[fol. 37] A. Yes, like Wagner-Niehaus, I talked to Albert Wagner, he is one of the owners, and the Columbia Machine, I talked to Mr. Pringle—he is the superintendent down there—and also Ray Mallatesta, I think he is the head time keeper—Mallaspina, he is the head time keeper there, and he used to call me at home many a times, he called me at home for marine jobs, but as it was, he asked me how I was with the union, * * *

* * * * * * *

Q. Mr. Gonzales, are you now able to, physically able to work?

A. No, sir.

Q. You are physically disabled at the present time, are you not?

A. Yes.

Q. You are now on leave from the Veterans Hospital?

A. Yes, in Livermore.

Q. And you were given leave to come here in order to testify in this trial, is that right?

A. Yes, sir.

Q. When were you incapacitated, when did you become so ill with this present illness that you were unable to work?

[fol. 38] A. June 16th.

Q. Of what year?

A. This year.

Q. Of 1953?

A. 1953.

Q. And up until that time, from about March 4th, of 1952, you were seeking employment as a marine machinist, but were unable to obtain it, is that correct?

A. Yes, sir.

Q. Now, did you seek any work outside the field of marine machinists?

A. No, sir.

Q. Will you state why?

A. Well, it was a trade that I followed all the time, and I liked it, and I always—I put in a lot of my time, I studied it, I took marine engineer in college for a year and a half, I went out as a marine engineer, and I was competent to perform them jobs; and therefore, I didn't want to go in another field.

Q. You had worked with many established firms, here, had you?

A. I knew the owners, all of them. I used to sometimes go down the hall and pick out qualified men that were marine men to do their stuff, and now since this trouble, well I couldn't do anymore of that.

Q. And as a marine machinist, you were called in frequently on rush repair jobs, were you?

A. They called me from the house, yes.

Q. And in such jobs, you would continue to work long after the eight hour regular shift, long after the eight hour [fol. 39] shift had been put in, is that right?

A. Quite often.

Q. And everything after eight hours was paid at double time, is that right?

A. Yes, sir.

Q. Now, marine machinists work is a special branch of the trade, recognized as such by your union, is it not?

A. Yes, sir.

* * * * *

Q. Mr. Gonzales, when you applied at Wagner-Niehaus for employment; you said you spoke to Mr. Wagner, was it?

A. Mr. Wagner.

Q. He is one of the owners of that concern, is he?

A. Yes.

Q. And you have worked for that firm, before, have you?

A. When they first started in.

Q. Do you remember approximately when you applied [fol. 40] to him for work? That is, since March 4th, 1952.

A. I am not quite sure, but it was in March or April, he had a big job and then I took a walk down there because at the hall I seen they were dispatching quite a number of men, and they had two or three boats. I went down there and I happened to meet Mr. Wagner.

Q. You noticed from being present at the dispatching office in the hall that men were being dispatched to Wagner-Niehaus?

A. Yes.

Q. You went down and spoke to Mr. Wagner there?

A. Yes.

Q. What did you ask him?

A. Well, first thing he asked——

Mr. Kennedy: Excuse me, Counsel, I am going to renew my objection to these conversations which are not binding on the Respondents here and they are hearsay; and we regard them as something we have to object to.

Mr. McMurray: Your Honor, in the first place, the question is as to what the Plaintiff said, not what was said to him but meeting the issue, I think that we are entitled to show these conversations and we can show by the testimony of this witness what response he got from employers from whom he sought employment, because the—his testimony about the other persons named is not offered as to the—to prove the truth of what Wagner, for example, said, but is offered for a separate purpose entirely; that is, to show [fol. 41] the result of the Plaintiff's effort to obtain employment in his trade. And so none of the objections to hearsay, none of the policy reasons why hearsay evidence is objectionable is applied here. It is not offered to prove the truth necessarily.

The Court: You are contending that this man was out of the union anyway, aren't you, Counsel?

Mr. Kennedy: We are stating he is out of the union, the advice of this line of questioning——

The Court: Is there any question about the fact that if he had been a full fledged member of the union, according to your contention, that he would have had employment?

Mr. Kennedy: That is what I was trying to raise, as a matter here, your Honor, the history will show that there may well have been—and I can't state one way or another—that there may have been reasons why certain of these employers would not want to employ Mr. Gonzales. I am not stating that they did exist, but for example, in some of the employment that he had, he had the misfortune to become injured. Now, conceivably that would be one of the grounds for refusing him employment. What we are doing here, is, we are taking Mr. Gonzales' version of a third party's statement, and the only purpose of it is to ascribe to that third party the purpose that they had in not giving him employment; and we don't have that party here, and I think that that is the danger of this type of testimony so [fol. 42] far as the Respondents are concerned.

The Court: I think your objection is well taken so far as that is concerned, but I was trying to narrow the issues down. You are making some point of the fact that even if he had been a member, there was no employment available. I think the union records would be the best records of that.

Mr. McMurray: Very well. Then I will conclude with this witness and approach that matter another way, your Honor. I may have to ask for a little time to bring in some of the employers. I had not anticipated any difficulty on this matter, the fact that—

The Court: Well, you may get a stipulation out of Counsel to the effect that employment was offered him by certain employers without going into the conversation.

Mr. McMurray: I don't think—

Mr. Kennedy: As a matter of fact, I think that is contrary to the fact. I think that he was unsuccessful in getting employment, I don't know that is—

The Court: All right, you may ascertain the facts and get into a stipulation, otherwise, it would be hearsay unless you brought in the employers.

Mr. Kennedy: If we can reach a stipulation, we will be very happy to.

Mr. McMurray: Now, Mr. Gonzales, from approximately March 4th, of 1952, to—what date was that in—June of this year?

A. June 26th.

[fol. 43] Q. June 26th of this year, you were seeking employment as a marine machinist, and you received no employment, is that correct?

A. That's right.

Q. Your sole source of support is what you earn, is that correct?

A. Yes.

Mr. McMurray: You may inquire—

[fol. 44] AFTERNOON SESSION 2:00 P. M.

The Court: Ready, Counsel?

Mr. Kennedy: Yes, your Honor. Have you any further questions?

Mr. McMurray: No, no further questions.

Cross examination.

By Mr. Kennedy:

Q. Mr. Gonzales, as a member of Lodge 68, have you had access to the Constitution of the Lodge?

A. Yes, sir.

Q. Now, I will hand you for specific reference a copy marked, or, that is, effective April 1st, 1950, and ask you if you have seen that?

A. Yes.

Q. You have seen it and you are familiar with it?

A. Yes.

Mr. Kennedy: Counsel, is there any question about this—question, as to the authenticity of the Constitution? If not, I would like—

Mr. McMurray: I have not.

Mr. Kennedy: —if not, I would like to introduce as Respondents' Exhibit 1, the Constitution of the Lodge, 68.

The Court: It will be admitted as Defendant's A.

The Clerk: Defendant's A.

(Whereupon, Constitution of Lodge 68 referred to was marked Respondents' Exhibit A and admitted in evidence.)

By Mr. Kennedy:

Q. Now, Mr. Gonzales, going first to the last employ-
[fol. 45] ment that you had, which I believe you stated was
in February, 1952—is that correct?

A. Yes.

Q. And my understanding was, if it is correct, that you
have not worked at all from March, 1952 until the present
time?

A. That's right.

Q. And I believe you also testified, did you not, that you
were injured during February, 1952, while working?

A. Pacific Ship—

Q. At Pacific Ship Repair?

A. Yes.

Q. And you also testified that you were released by Dr.
Kilpatrick on March 5th, 1952?

A. Yes.

Q. To go back to work?

A. I was released, yes, on the 4th or 5th; that's right.

Q. Did you ever make any claim that you were not able
to go back to work on that date?

A. No, sir.

Q. And with reference to your testimony about Mr.
Poynter, isn't it a fact that he merely testified in the Su-
perior Court trial that he did not know of Mr. Truax causing
any fight or disturbance on the October 25th, 1949 incident?
Wasn't that the substance of his testimony?

A. No, sir, he testified contrary.

Q. Well, what I am trying to say was that Mr. Poynter
testified that he didn't know that Mr. Truax caused any
[fol. 46] disturbance, isn't that true?

A. He testified it was caused.

Q. That Mr. Truax—

A. That Truax caused some disturbance.

Q. Do you remember what he said along that line?

A. I recollect that he claimed that Charlie was going

up to get a drink of water at the fountain, and he made a right hand swing at another one of the members—that started the trouble that evening—and he also testified about pushing me, helping one of them other fellows that caused the assault, pushing me out the door.

Q. So could you explain what you meant by your testimony that Mr. Poynter testified against you?

A. Yes.

Q. Would you explain that please?

A. Well, he testified that he—well, he contended that he did push me out the door, and with the other fellow, those other fellows implicated too.

Q. So that we will get this straight, do I understand that it is your testimony now that Mr. Poynter testified in the Superior Court action up here in the City Hall?

A. Yes sir, in both cases.

Q. And that he testified against you?

A. Yes.

Q. And by testifying against you, he testified in effect that Mr. Truax was implicated in the disturbance in which [fol. 47] you were involved?

Mr. McMurray: I will object to that as argumentative.

The Court: Sustained.

By Mr. Kennedy:

Q. Now, with reference to the testimony of Mr. Speed, Mr. Gonzales, isn't it a fact that he merely brought in some union records and read off in Court, what they showed?

A. No, sir, he testified in favor of the Defendant, Kenneth Nelson.

Mr. Kennedy: Well, I move to strike that answer, your Honor.

The Court: It is stricken.

Mr. McMurray: Your Honor, I don't see why it should be stricken. It seems to me it is responsive to the question, isn't it a fact that he brought in some records and read them, and the witness said, "No, he was testifying on behalf of Nelson."

Mr. Kennedy: I was moving on the grounds it was a conclusion and not responsive as such.

The Court: I didn't hear the "No". I will allow the "No" to remain; the rest of it is stricken.

By Mr. Kennedy:

Q. Mr. Gonzales, after the trial Committee of the local made a finding against you on August 2nd, 1950, it is a fact, is it not, that you filed some charges with the National Labor Relations Board?

[fol. 48] A. Yes, sir.

Q. And these charges were against the local union?

A. Yes, sir.

Mr. McMurray: I will object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

By Mr. Kennedy:

Q. And that you had some conferences with the representatives of the Labor Board with respect to your case?

A. Yes.

Mr. McMurray: Objected to on the same ground.

The Court: Overruled.

By Mr. Kennedy:

Q. And it is also true, is it not, that you were informed by these representatives that they couldn't find any evidence of violation of the National Labor Relations Act by the union?

A. No, sir, they told me to get a lawyer. They advised me to get a lawyer for this particular case.

Q. Well, did you get a lawyer then, Mr. Gonzales?

A. Yes, sir.

Q. And after you got a lawyer, you withdrew the charges?

A. That's right.

Q. And it is true, is it not, that among other things that you were told by the representatives of the Labor Board,

was that they couldn't find any evidence of violation on the part of the Union, isn't that true?

A. They didn't tell me that.

[fol. 49] Q. Mr. Gonzales, at this union trial it is true that you admitted in effect, did you not, that you had no evidence at all that Mr. Truax instructed Nelson to beat you?

Mr. McMurray: I will object to that. The evidence—the transcript of the trial is the best evidence of what was said there.

The Court: Sustained.

By Mr. Kennedy:

Q. One minor thing, Mr. Gonzales—your testimony about being a member of the Policy Committee, were you correct on that point, of Local 68?

A. I was on the Policy Committee, investigating committee, which is the same thing.

Q. Wasn't it the committee that passed on the applicants for membership, wasn't that the function of it?

A. Yes, sir, but I was—just two of us, Ed Peck and me.

Q. Well, it would be fair to say then that the function, your function on that committee was to determine the applicants—

A. That's right.

Q. What is your situation now, Mr. Gonzales, with respect to your health and ability to work, do you have any favorable reports?

A. I didn't hear the last part, sir.

Q. I was interested in knowing what the doctors tell you now about your ability to go to work, if anything.

A. Well, I had a conference with the doctor last week before the board, and they told me that it would take me about three or four months before I'd be rehabilitated, and [fol. 50] then they would release me from the hospital, but I could go anytime I wanted, but they told me it would be better for me to stay there and get—until I felt better.

Q. On this question of your injury at the Pacific Ship Repair, you injured your back, was it?

A. I explained that.

Q. And you had prior trouble with that, that it kept you from work, is that correct?

A. Well—

Mr. McMurray: I will object to that as going beyond the period that is material here.

Mr. Kennedy: It is just preliminary. I will withdraw that. It is not particularly important.

Q. What I am get-ting at, or trying to get at, Mr. Gonzales, that since March 5th, 1952, has your back, the condition of your back prevented you from working at anytime?

A. No, sir.

Mr. Kennedy: That is all; thank you.

Redirect examination.

By Mr. McMurray:

Q. With regard to Poynter as a member of the Trial Committee, you say that he testified in Court that he had been one of those who assaulted you at the time that Nelson did, is that right?

A. That's right.

Q. Did he volunteer that testimony or was that admitted on cross-examination?

A. That was admitted.

[fol. 51] Q. On cross-examination or direct?

A. Well, on direct and then cross; that is, on both trials he contended that he helped Nelson push me out the door.

Q. And you consulted with me when the Labor Board told you to get a lawyer, did you not?

A. Yes, sir.

Q. And I advised you to go to the Labor Board, in the first place, did I not?

A. That's right.

Q. And you discussed the matter with me and decided to drop the charges, did you not?

Mr. Kennedy: I am going to object to the leading nature of these particular questions, your Honor.

The Court: Sustained.

By Mr. McMurray:

Q. What was your reason for withdrawing the charges, Mr. Gonzales?

A. Well, I being a member of the Lodge for so long, I didn't want to jeopardize the position of our Lodge because in the past it is pretty well messed up. What I wanted to do, was not give any further trouble, bring it out in the open before the Board, so I thought it was best to drop the charges and I wrote a letter. I am quite sure I wrote a letter to A. J. Hayes, again appealing to him and telling him about the misconduct of the way the Lodge was being run by Charles Truax, and, well, he just ignored my letter.

Q. Then you did withdraw the charges?

A. Yes.

[fol. 52] Mr. McMurray: No further questions. That is all, Mr. Gonzales.

Mr. Kennedy: I'd like to offer the copies of the charge of withdrawal, and the reason that I am offering them is purely for the convenience of referring later to particular sections, in the event you want to argue. The contents, I believe, is just the formal documents of the charging of the withdrawal, but it contains certain sections of the National Labor Relations Act that I will probably refer to later.

Mr. McMurray: I will object to it on the grounds that it is immaterial, your Honor.

The only way I can see that the question of the Labor Board has any materiality is if the argument is advanced, and I take it that it will be—

The Court: I allowed that questioning on this theory:

To show any bias or prejudice of this witness on cross-examination. I don't think the National Labor Relations Board hearing or the matters alleged have anything to do with this hearing. It was merely for that reason to show any possible course of conduct that might throw any light upon this man's attitude towards the union.

If it had been objected to, I would have given the reasons, but I just allowed it as a preliminary question, and you got into it to a certain extent, merely to show bias or prejudice, if any.

Mr. Kennedy: Your Honor, I would like to state, if I

[fol. 53] may, that the only purpose of injecting this issue at all is in connection with the argument about the exhaustion of remedies. We don't contend in anyway, what the labor Board did, reflects on the merits or lack of merits of this charge, of Mr. Gonzales' case, and we are not offering it for that purpose at all, but the section does contain references to certain sections of the Labor Act which the Court could take judicial notice of, and I thought as a matter of convenience we could have these sections before the Court by having this formal document introduced in evidence.

The Court: Well, if there are any sections in the Labor Relations Act that you think the Court ought to take judicial notice of, just call them to my attention. I have a copy of them.

Mr. McMurray: That is all, Mr. Gonzales.

The Court: You may step down.

Mr. McMurray: The Plaintiff will call Mr. Faure.

ELIE FAURE, called as a witness by and on behalf of the Petitioner, being first duly sworn, was interrogated and testified as follows:

The Clerk: What is your first name?

The Witness: Elie—E-l-i-e Faure—F-a-u-r-e (Spelling)

The Clerk: Your address?

The Witness: Box 242 Kentfield.

[fol. 54] Direct examination.

By Mr. McMurray:

Q. Mr. Faure, is that correct pronunciation?

A. Right.

Q. What is your occupation?

A. Business Agent of Lodge 68.

Q. And how long have you been the agent there?

A. January 15th, 1952.

Q. You have been a member for a number of years before that?

A. Yes.

Q. Do you know the Plaintiff in this case, Mr. Gonzales?

A. I do.

Q. And Mr. Faure, do you know approximately how many members the Lodge had, local 68, that is, had in August of 1952?

A. Oh, I have an idea approximately—I'd say in the neighborhood of 4000.

Q. And at that time was there a regular time and place set for the meetings of the local?

A. Yes.

Q. When were the meetings held; was it on a certain day every other week or—

A. Twice a month, first and third Wednesdays of each month.

Q. First and third Wednesdays of each month. Those were regular meetings, were they not?

A. Yes.

Q. Now, on occasion, it has been necessary to call special meetings, has it?

A. That's right.

[fol. 55] Q. And in your minutes, you indicate whether or not a meeting is a regular meeting or a special meeting?

A. That's right.

Q. Now, you were a member in August of 1952?

A. That's right.

Q. Were you present at the meeting, at which meeting on August 2nd of that year, when the vote was taken to rescind the prior action with regard to Mr. Gonzales?

A. May I ask you a question? You are asking me in August of '52, is that what you are asking?

Q. Yes, excuse me—I mean August of '52—I mean August of '50—may I have that Exhibit 3?

The Clerk: Plaintiff's 3?

Mr. McMurray: Yes.

Q. Now my question, I will repeat it, were you present at the meeting of August 2nd, 1950?

A. No, sir.

Q. Were you a member of the union at that time?

A. Right.

Q. Now I am sorry, I have inadvertently asked questions

regarding the wrong year. Do you know approximately how many members the Local had in August of 1950?

A. Not offhand, no.

Q. Has there been any significant change, any large change in the membership of the union as to numbers, that is, in the past four or five years?

A. I don't think so.

[fol. 56] Q. For many years it has had in the neighborhood of four or five thousand members, has it not?

A. It all depends how far back you want to go. If you say many years, that covers quite a territory.

Q. I will agree with you, at least since 1945.

A. There has been quite a difference in membership, since 1945.

Q. But in August of 1950, at any rate, there were in the neighborhood of 4000 members?

A. I think that is approximately correct.

Q. And the questions that I asked you, with regard to meetings, regular meeting nights, they would apply to 1950 as well as to 1952, would it not?

A. Yes.

Q. Now, was any method regularly used in 1950, to notify members of the union of any business that was to be done, taken up at a meeting?

A. I couldn't testify to that because I didn't attend those meetings regular at that particular time, and I couldn't testify to that, because I wasn't there.

Q. You were a member at that time?

A. Right.

Q. Did you receive, as a member, any notice from the union about business to be taken up at regular meetings?

A. Could I ask a question in order to prepare my answer? What do you mean, in regards to the Gonzales case? Is that what you are referring to, or the general business of the Lodge?

[fol. 57] Q. Well, first of all, let me ask you about the general business of the Lodge.

A. Well, the general business of the Lodge, whenever there is a special meeting called for actions on policies of the Lodge, we get notification.

Q. But whenever there is a meeting, regular meeting

to be held, you did not get any particular notification, is that correct?

A. No, that's right.

Q. Now, with regard to Marcos Gonzales, did you receive any notice from the union that any action was to be taken with regard to Marcos Gonzales on August 2nd?

A. No, I didn't.

Q. Now do you know, Mr. Faure, whether any by-laws or other regulations concerning the Local, beyond those which appear in the union constitution, which has been offered in evidence, received in evidence, as Respondents' Exhibit A—

A. The only by-laws the Lodge has is in the International Constitution, we comply with.

Q. You are familiar with that, are you not?

A. That's right.

Q. Is there any provision in here with regard to a quorum, what constitutes a quorum of the Local Lodge?

A. I couldn't tell you offhand whether it is in there or not. I wouldn't know.

Q. Do you know if there has been any practice with regard to determining what a quorum is?

[fol. 58] A. Well, it's always been a policy of the Lodge that a quorum should be 25 members exclusive of the officers of the Lodge.

Mr. McMurray: Your Honor, may I confer with Counsel for just a moment, on this question?

Q. Mr. Faure, prior to August, 1952, let me say between February 1952 and August of 1952, did Lodge 68 have any agreement with employers, collective bargaining agreements with employers in the Bay Area?

A. Yes.

Q. It did have?

A. Yes.

Q. And do you have copies of those with you?

A. No.

Q. Were those agreements terminated and a new agreement put into effect in August of 1952?

A. They generally are,

Q. Do you know whether they were in this case?

A. Well, what reference to what agreements are you talking about?

Q. Well, all the agreements which Local 68 had with employers in the San Francisco area.

A. That is the policy of the Lodge when an agreement expires, to initiate a new agreement, that you terminated the old agreement, before the new one goes into effect.

Q. And in August of 1952, a new agreement went into effect, did it not?

A. No, my first agreement went into effect—

[fol. 59] Q. The first agreement?

A. As far as the one you have in your hand is concerned, yes.

Q. You had agreements before that, though?

A. Not with the marine industry.

Q. Let's get this straight, Mr. Faure. I am ignorant on the subject and you have the knowledge. My questions may not be put to bring it out. Were there agreements between employers of marine machinists, employers who did repair work on vessels, in existence, agreements between Lodge 68 and such employers, during the period from February 1952 to August of 1952?

A. Not to my knowledge.

Q. There were none. And in August of 1952, such an agreement became effective, however?

A. Yes.

Q. Was there any material difference between the procedure followed with regard to hiring of marine machinists before and after the effective date of that new agreement?

A. Not to my knowledge.

Q. Now, I show you the booklet entitled "Pacific Coast Master Agreement for Marine Machinists Between Pacific Coast Shipbuilders and International Association of Machinists and Local Lodges Nos." among others, 68.

A. That's right.

Q. That is the agreement that you testified to a moment ago, is it not?

A. It is the agreement that went into effect in August of 1952.

[fol. 60] Mr. McMurray: I will offer that in evidence, your Honor, as Plaintiff's Exhibit next in order, calling attention

particularly to the provisions of Section 2, Union Security and Hiring of men.

The Court: It is admitted in evidence.

The Clerk: Plaintiff's 8.

The Court: Petitioner's Exhibit next in order.

(Whereupon, copy of agreement referred to was marked Petitioner's Exhibit No. 8 and admitted in evidence.)

Mr. McMurray: Now, your Honor I have here—oh, excuse me, I have a witness on the stand.

That is all the questions I have, Mr. Faure.

Mr. Kennedy: I have nothing at this time.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. McMurray: I have here, your Honor, a copy of the Constitution which became effective April 1st, 1949, which was the Constitution and by-laws in effect during the period when the trials were held here, and I understand, Counsel, that there are no material changes in the Constitution, between that and the one that's been introduced into evidence, insofar as this case is concerned.

Mr. Kennedy: I am relying on Mr. McGraw. I have never seen that, Counsel, but we have no objection, if you want to introduce it.

Mr. McMurray: Perhaps then in order to be perfectly clear, have the record perfectly clear, your Honor, I will offer in evidence the Constitution effective April 1st, 1949.

[fol. 61] Mr. Kennedy: The only thing—I am not objecting to it in evidence—I would like the record to show that that constitution or the constitution that I offered was the one that I understand to be effective at the time that Gonzales was tried by the Local, on July of 1950.

Mr. McMurray: I take it we have both of them in, the entire period is covered.

The Court: All right, we will admit it in evidence as Plaintiff's Exhibit next in order.

The Clerk: Plaintiff's 9.

(Whereupon, copy of Constitution was marked, Petitioner's Exhibit 9 and admitted in evidence.)

Mr. McMurray: Plaintiff will rest, your Honor.

Mr. Kennedy: We would like to make some motions for non-suit and to quash the writ, your Honor, first of all, on the ground that Plaintiff's case shows by an examination of the Constitution and by the testimony of the Plaintiff, that he has not exhausted his remedies within the local organization, nor the International.

Now on this point the California cases can be summarized as holding firmly that the constitution of a labor organization is a contract between the member and the organization, the terms are binding on both of them, and when a person becomes a member of the association the terms of the constitution are the conditions that he agrees to when he accepts such membership and he is granted that [fol. 62] privilege. Section 6 of Article 25 provides as follows, your Honor—now, I am reading it in part, this is in the middle of that section which is the most pertinent part:

“Before any appeals can be taken from any decision of the Executive Council, the decision, and all orders of the Executive Council in relation thereto, must be fully complied with by all parties concerned therein, in order to entitle them to enter an appeal, and in no case shall any district or local lodge or any individual member or members thereof, appeal to the civil courts for redress until after having exhausted all rights of appeal under the provisions of this Constitution. No member of the Executive . . .”——

That is all that is pertinent there. Now in connection with that section, there is provided that—there is a further appeal to the convention—the particular section escapes me at the moment, your Honor, but the Constitution will reflect, I think——

The Court: Well, Mr. McMurray concedes that. He hasn't——

Mr. Kennedy: Well I think Mr. McMurray——

The Court: He says he doesn't have to appeal at all, right?

Mr. McMurray: That's right.

The Court: I think he concedes that if an appeal were [fol. 63] required in this case, that he has not exhausted

that final step and gone before the—I think I gathered that from your opening statement——

Mr. McMurray: That's correct. However, I point out that the appeal offered here is a nullity. You are required to apply from the decision that you are appealing from before you can appeal further; I will argue that no effective appeal is offered.

The Court: There are also a line of decisions that if an appeal would be, in effect, actual, serve no purpose, it can't be had, can't be complied with. There are some decisions to that effect, are there not? Then it is not necessary to exhaust all the remedies.

Mr. McMurray: Number of recent decisions on that.

Mr. Kennedy: I think in that case the record has to reflect that it would be a waste of motions to go through those appeals. I find that I had a right before me, the thing I was looking for, your Honor, on the same page. It specifies a decision, that is page 59 of the Constitution. It specifies that in addition to the referendum that an appeal may be taken to the convention of the International. Now in that connection, I'd like to point out a California case that involved comparable factors.

It is Bush against the International Alliance, 55 Appellate Second 357, and I will read, if I may, from page 365 of that decision:

[fol. 64] "It is apparent from the record that the Writ of Mandate should have been denied in any event, for the reason that the Petitioner failed to exhaust all the remedies provided by the Constitution and by-laws of the union. As stated, these constitute a contract between the member and the union, binding both upon the member and the union. And, as heretofore stated, the constitution and by-laws of the union provided for a final appeal by an aggrieved member of the Alliance in convention assembled. This, the Petitioner failed to do, stopping with his appeal to the General Executive Board."

There is a reference, your Honor, in 21 ALR 2nd in which that case is cited, and if my recollection is correct, it goes into the question of fact, that the question is held out of state or is not to be held for a few months or a

lapse of time, does not make that appeal inoperative insofar as constituting an appeal. On the question of exhausting his remedies, I have in mind the statement just made by Counsel, or rejected; it is true that in order to comply with the decision of the International President that the Plaintiff would have to pay \$500 and that we don't dispute that at all, and it also appears that he would have to make an apology.

It does not appear from the record or from anything that's been introduced here that Plaintiff attempted to make a contingent apology, or to state that he was apolo-[fol. 65] gizing merely for the purpose of an appeal. That is speculative; that is in the past. I don't think the situation is such that you can say that automatically, that there was no effective appeal available.

We can conceive, as it approaches that ingenuous point, Counsel and the Plaintiff may have had to take the sting out of complying with the requirements of his living up to the contract.

Now granting that it may be onerous and that it may be a—something that seemed to the Plaintiff to negative his rights of appeal, the fact remains that under the cases, and there is several recent cases, Supreme Court cases which have reiterated that principle, that the constitution is the contract—granting that the terms of the contract are onerous, we submit that that in itself is not grounds for saying that a person need not comply with them.

In *Cason versus Glass Bottle Blowers Association*, at 37 Cal 2nd 134, which is a recent Supreme Court case, that principle was reiterated.

The Court: In other words, in this case he would have had to apologize and say, "Well, I am only apologizing for purposes of appeal for the time being"?

Mr. Kennedy: If that is the way he wanted to approach it, and on the other hand he could apologize and then appeal and then withdraw it, I suppose.

Now, your Honor, with respect to construing the terms [fol. 66] of this constitution and whether or not it is reasonable, we submit that under the approach that the Court will not unduly interfere with the internal functions of an organization and that they will not retry cases that the union has tried and that they will not substitute their own

interpretations of the law, there is, I believe, two well accepted propositions—

The Court: Well, I suppose that if they imposed a fine that perhaps there wouldn't have been any great objection, though the man would have to part with \$500, but it might be akin to paying a tax under protest. With the requirement of an apology, because once an apology is made, it is made—you can't unring it—well, I get your point now. What are you saying, Mr. McMurray?

Mr. McMurray: Well, first of all that—

The Court: You are contending that—if I get your theory—that you didn't have to appeal to begin with.

Mr. McMurray: For a number of reasons. Perhaps I'd better state them.

The Court: All right.

Mr. McMurray: It is somewhat extensive.

First of all, the law is perfectly clear that in these expulsion cases, the terms of the constitution and by-laws must be very strictly complied with. That has been the holding of the courts in a number of recent cases in which we have had the misfortune to be on the losing side, cases [fol. 67] involving the Marine Cooks and Stewards Union.

Now, in this case, the constitution is quite explicit with regard to the methods to be used in disciplining or expelling members. They are set forth in Article K of this little booklet, the Constitution, and that provides in Section 6 that:

“The Trial Committee shall report at the next regular meeting of the local lodge. Such report shall be in two parts as follows:

“First: The report shall contain the findings and verdict of the Trial Committee, together with a synopsis of the evidence and testimony presented by both sides.

“After the Trial Committee has made necessary explanation of its intent and meaning, the Trial Committee's verdict with respect to guilt or innocence of the Defendant, shall be submitted without debate to a vote by secret ballot of the members of the local lodge.

"Second: If the lodge concurs with a 'guilty' verdict of the Trial Committee, the recommendation of the Committee as to the penalty to be imposed shall be submitted in a separate report to the lodge and voted on by secret ballot of the members then in attendance."

Now, there is no consideration at all for considering or [fol. 68] rescinding or taking further action upon the matter after the vote has been against the recommendation of the trial committee, and it is our position that there would have to some specific authorization for that in these by-laws for that to be allowed. But in addition to that, not only is there no specific provision here, but there is a provision that Roberts Rules of Order govern the proceedings of all these lodges unless it is otherwise provided. Roberts Rules of Order in Section 37 provides that no motion to rescind can be made, that is, the motion that was made in this case. No motion to rescind can be made on a motion which expelled or elected a member to a body.

Here are the exceptions to a vote to rescind. The vote can not be rescinded after showing has been done as a result of that vote, that the assembly can not undo or in case it is in the nature of a contract and the other party is informed of the fact, or where a resignation has been acted upon or one has been elected to or expelled from membership or office, and the person was present or has been official- notified of the acceptance or expulsion.

The only way to reverse action of expulsion is to restore the person for membership or office which requires the same preliminary steps in the vote as is required for an election. So a motion to rescind, can not be made in the case of a motion which has dealt with the election or expulsion from membership in a body.

[fol. 69]. Furthermore, the general rule on motions to rescind in Roberts Rules of Order as stated in Section 37 is that notice must be given at the previous meeting or called for the meeting, that a motion to rescind is to be presented or it may be rescinded without necessity, by a two-thirds vote or by a majority of the entire membership.

None of those conditions was complied with here.

Furthermore, if the motion to rescind be considered as a motion to revoke or reconsider, it is not in accordance

with the provisions of the Article K—no, not Article K—the Constitution of Local Lodges as appearing in Article G which provides that no motion to reconsider may be had unless it is moved by one who voted in favor of the motion, or one who voted on the side that prevailed in the previous meeting.

That is also in accordance with Roberts Rules, and is repeated in the constitution and by-laws.

Now since, by the constitution it was required that the vote be on a secret ballot and it was on a secret ballot here, it is perfectly apparent that it was never intended that this kind of a motion could be rescinded, and that a man could, win one time and then the next meeting, when his friends aren't there, lose again, because nobody can tell who voted on which side where you have a secret ballot on it.

So, it is impossible for anybody to make a motion to reconsider a vote on this kind of a question.

Also, the decision of the President of the Grand Lodge [fol. 70] is the fine for \$500 and it is provided in Article K that no fine more than \$50—Article K, Section 8, page 101. I will read it:

“No fine shall be imposed upon any member or applicant eligible for membership in this Association in excess of \$50 unless the same is first approved by the Executive Council.”

And the Executive Council has, as the evidence showed, the Executive Council had not acted on the question of the fine until after it had been imposed by the President; and furthermore, the punishment imposed was a fine and the necessity for making an apology, which is nowhere provided for in the provisions of Article K, although the—or elsewhere in the constitution, although the punishment for the offense of which the Plaintiff was convicted is set forth in Article 25, Section 1 of the Constitution, provides the following punishment:

“Section 1. Any district lodge; local lodge or any member or members of a local lodge circulating or causing in any manner to be circulated any false or

malicious statements reflecting upon the private or public conduct . . .” —and so on—I won’t read the whole thing— “. . . any such individual found guilty of a violation of the provisions of this Section shall be subject to fine or expulsion or both.”

[fol. 71] But it says nothing about an apology. So that portion of the punishment was severely illegal.

Finally, I think it is illegal to penalize a man because he went to court about a wrong which he felt had been committed on him and submitted that question to the courts, set up by the State of California, and that is what was done in this case.

So with all of these things, there are more, but I didn’t think it necessary to dwell on them at any greater length—I think we come clearly within the rule that where the procedures set forth in the constitution haven’t been followed, then it is not necessary to exhaust remedies or to appeal, and I would rest also on the ground that the purported appeal offered is not an appeal since it would require you to execute the sentence, before you could appeal, and the ground that the punishment or sentence imposed was illegal from its very beginning.

Mr. Kennedy: Your Honor, with respect to interpretation of Roberts Rules, I have a copy here too, by chance, and we disagree with the interpretation of Counsel. Now I suppose it would be fruitless for each to argue our own interpretation of it.

The Court: Perhaps somebody ought to put one of those in evidence.

Mr. Kennedy: I was going to suggest—

The Court: I think I can take judicial notice of Roberts [fol. 72] Rules of Order.

Mr. McMurray: Could you—

Mr. Kennedy: If we stipulate that you can, it would be agreeable with me, your Honor.

Mr. McMurray: I would so stipulate, your Honor. The copy I have here is the property of the—

The Court: Oh, I have a copy, but I was—I can get a copy, I have one, as a matter of fact. The point that I was concerned with was whether I could take judicial notice of it.

Mr. McMurray: Yes.

The Court: If I can't take ~~judicial~~ notice of a Municipal ordinance, I suppose I can't take judicial notice of Roberts Rules of Order. They aren't an official treatise or statutory enactment.

Mr. McMurray: I understand we have a stipulation that you may take judicial notice of them, or may consult them.

Mr. Kennedy: That's correct, yes.

Now your Honor, as I say, we feel—although I am not arguing this at any length—we feel that Roberts Rules of Order were complied with or certainly an interpretation can be given with relation to this action. I just want to read this one sentence, which refers to a motion to rescind, and it states:

"With exceptions noted later, any objection or un-[fol: 73] executed part of an order may be rescinded by the majority of the vote provided notice has been given at the previous meeting or in the call for this meeting, or it may be rescinded without notice by a two-thirds vote."

Now, with respect to the compliance of Section 8 of Article K, I haven't studied that thoroughly, your Honor, but I would like to state in that connection that—

The Court: Did you have a two-thirds vote here?

Mr. Kennedy: Yes, your Honor.

Mr. McMurray: I think not. It falls one short of a two-thirds vote.

Mr. Kennedy: Well I think we can—we will submit the union—

The Court: The minutes will reflect.

Mr. Kennedy: Yes.

Mr. McMurray: May I look at them, your Honor, while Counsel is arguing?

Mr. Kennedy: That's right.

The Court: Well, the point, the question that confronts me, as I sit here, is assuming that the things that you say are correct, Mr. McMurray, that certain of these steps weren't followed, some of these procedural steps, wouldn't you still be obliged to urge that as a point on your appeal within the structure provided for by the union's by-laws

or the constitution? Let's assume that the President [fol. 74] couldn't fine more than \$50 but he did it. Wouldn't the convention or the Executive Committee have the right to reverse him on that score?

Mr. McMurray: Yes, but he fines you \$500 and says "You have to apologize" and before you can take any further appeal, see, he went up to the point where he could take his appeal without complying with the judgment, but before you can go any further you have to apologize and you have to pay the \$500. And you can't take any steps. The portion that Counsel read indicates you can't go beyond that point without complying, without complying with the judgment.

The Court: You concede then if he had just been fined \$500 without the conditions precedent that he pay it, that his remedy then would have been to exhaust his appeal before the International.

Mr. McMurray: That would have been an available remedy, but I do not concede, under the Weber case, and the cases that have followed it, your Honor, that he would have been required to do that before complying with—before coming to court, because these cases have gone to an extent quite unprecedented, and I must say over our most strenuous efforts to the rules that where the procedure set forth in the Constitution wouldn't—wasn't followed, even though the procedure that was followed may have been more democratic and a better procedure from every point of view; still the procedure set forth must be followed and if it is not followed the whole procedure is [fol. 75] illegal and no exhaustion of remedies is necessary for a court can grant relief.

The Court: Well it seems to me in this case that rather than proceed with the Respondent's evidence, there doesn't seem to be too much dispute as to what took place—

Mr. McMurray: No, there doesn't.

The Court: It is more or less an interpretation of what law is applicable and what rules and regulations apply. It seems to me that the sensible approach to this case would be to submit the matter now as far as the motion to quash is concerned, and submit it on points and authorities.

Mr. McMurray: It would seem to me to be proper. 1

hadn't expected to get to this point of trial today or I'd be prepared to argue it now.

The Court: It seems to me that Counsel's contention is, if you haven't exhausted your remedies, that is the end of your case. I guess you concede that. If that is the law, as I would find it, there'd be no point in going any further.

Don't you think that is a sensible approach, Counsel?

Mr. Kennedy: Yes, your Honor.

The Court: I'd like some authorities first of all on whether or not the failure of a subordinate group or a subordinate officer to comply with jurisdictional requirements should not first be reviewed by the higher tribunals as testified in the by-laws or the constitution of the union of the International; and secondly, I think the big point here is [fol. 76] whether the fact that the constitution required that the order be complied with before the final step of appeal be taken, whether or not that would come within the category of decisions that say that if an appeal is in effectual, you don't have to exhaust that remedy.

It may well be that there are some authorities that will say, well, you've got to do it anyway. Because, as I understand the contention of the Respondents, it is that this is a contract and if someone joins a union and that contractual provision is in there, that he's got to pay his money in advance before he can appeal, he certainly knows—he certainly has contracted with that in mind, hasn't he?

Mr. McMurray: I don't—

The Court: Now, whether a member is burdened—that makes that type of provision ineffectual or illegal or unlawful is something else.

Mr. McMurray: If I may comment, your Honor, I would say that it seems to me that to miss the point, and of course this is perhaps just part of the memoranda that should be submitted, and yet your Honor has outlined now what seems to be the points on which this case turns, at the present moment, at least, and where it is not part of the contract that one should have to apologize, how can the argument that this is part of the contract apply? I don't understand that.

The Court: That is not in the contract, is it?

Mr. McMurray: No, and yet it is in the contract that [fol. 77] you have to execute the judgment and judgment says you have to apologize, so it seems to me that unless we take a little broader bite at the matter——

The Court: Well, you can go as far as you want in your brief. I am just indicating the matters that seem to be of primary concern at this moment.

It may well be that the decisions indicate that in a situation, that the punishment imposes something that is not provided for, that then you don't have to appeal. How long will it take you men to get a brief in?

Mr. McMurray: Ten days? I could get it in sooner, but if I could have ten days——

The Court: Ten, ten and five.

Mr. Kennedy: Fine.

The Court: And then we will put the case over to a date beyond that, if you can get them in.

(Further discussion.)

[fol. 78] Wednesday, February 3, 1954, 2:00 o'clock P.M.

The Clerk: Gonzales vs. International Machinists Union.

Mr. McMurray: Ready.

Mr. Kennedy: Ready.

Mr. McMurray: Your Honor, I have a motion which I have filed, a written form. I am not sure whether it has reached the file in the case or not.

The Court: What is the nature?

Mr. McMurray: It is a motion for leave to amend the complaint to insert allegations regarding humiliation and, well, physical suffering, suffered by the Plaintiff as a result of his wrongful expulsion.

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[fol. 83]

A. C. McGraw, called as a witness by and on behalf of the Respondents, being first duly sworn, was interrogated and testified as follows:

The Clerk: What is your name, please?

The Witness: McGraw, 600 Van Nyes Building, Los Angeles 14.

The Clerk: A. C. McGraw?

The Witness: Yss.

[fol. 84] Direct examination.

By Mr. Kennedy:

Q. Your name is A. C. McGraw?

A. It is.

Q. What is your occupation, Mr. McGraw?

A. I am Grand Lodge Representative for the International Association of Machinists.

[fol. 87]

By Mr. Kennedy:

Q. Now, the record will show you, Mr. McGraw, that the trial, the union trial of this case involved a charge or a complaint against Mr. Gonzales that he had charged one of the union officers with having ordered a union member to assault and commit a battery on the Plaintiff. Now, would you state what significance, such a charge has, if any, with respect to the functionings and effect on a union officer?

Mr. McMurray: I will object to that, your Honor.

The Court: Sustained.

[fol. 89]

The Court: He is not denying the right that they had the right to bring him to trial on these charges, are you?

Mr. McMurray: No, but we do deny that having filed an action in the Superior Court under the circumstances which he did, containing the allegations which he did, constituted this matter of law, a violation of the sections of the union constitution that they were said to violate.

The Court: Yes, I didn't understand it that you had made—that you were resisting that particular feature of the case. I had understood the theory (upon which the case was tried, that you conceded that the union had a right to bring these charges against your client.

Mr. McMurray: I think they have, yes.

The Court: And that is what you are trying to prove now, that these grounds for these charges—I think that the Plaintiff's contention here is that after he had been tried on the charges and the membership had thereafter acquitted him, so to speak, that the machinery thereafter adopted was in contravention of the by-laws. I think that is the entire issue in this case, is it not?

Mr. Kennedy: Well, to me that seems to be a realistic analysis; * * *

[fol. 107] Mr. Kennedy: I realize that it speaks for itself. It is preliminary to another question.

Mr. McMurray: I withdraw the objection.

The Witness: Article 1, Section 3, and particularly lines 19, 20 and 21, is the first reference that I testified to, a few minutes ago.

By Mr. Kennedy:

Q. Now under that—strike that.

Do you know of your own knowledge any of the functions of the organization which rely for its authority upon that general language contained in those provisions, and if so, what type of action is taken pursuant to the powers that that creates?

A. Well, there are many, because this goes into varied subjects, such as the application of our laws; it even goes so far as to cover, for instance, the duties of a recording secretary at the local level. By custom and usage, he keeps the minutes. He is not required specifically by our law to do so. The method of appeals on trials is part of it. The method of ruling with respect to certain types of seniority in government lodges and the application of this contract or this constitution to a government employee who has no contract with a government as a collective bargaining agreement, but who, because of custom and usage has this constitution when it refers to contracts supplied by him in a particular way. It goes to the matter of an enforced transfer of member within so many days after he goes to work, within the jurisdiction of a different lodge, and there [fol. 108] are many and varied applications of it.

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By Mr. Kennedy:

Q. Mr. McGraw, I am going to ask you if you will direct [fol. 109] your attention to the period between January 1st, 1952, and August, 1952, and state whether or not you know of your own knowledge whether there was any collective bargaining agreement in effect between Lodge 68 and the employers that employed marine machinists as a general rule?

A. We had no contracts in this particular area at that time.

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[fol. 113]

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The Court: Now what is this?

Mr. Kennedy: That your Honor, is a union record, and I might state the significance or the relevance of it is that it shows out of work entries for the periods involved here, and it goes to the question of damages for several months prior to it.

The Court: Your objection is to the materiality in this also?

Mr. McMurray: Yes, and no foundation has been laid

your Honor. I may say that I have no—I don't contest the implied argument here that the periods during which the Plaintiff was out of work are material, but I think that it is necessary to deduce—to say something more than to offer this record to establish that he was unemployed during that period. As a matter of fact, I think if I may say so, Counsel may not be aware of this—during a number of the months shown in the record there, the Plaintiff was physically disabled and during other months the union refused to accept his dues and there was a—not until there was an instruction received from President Hayes that pending appeal his dues should be received, that they were received.

[fol. 114] The Court: I think this is probably cumulative in some respects. If you have no objection to the foundation as to it being a union record, kept in the regular course of business, I think it is material for whatever weight it would have.

Mr. McMurray: Very well. I think that that is an insufficient foundation and I would make my objection on the basis that no foundation has been laid, but I have no objections to its materiality if it is offered to show the periods when he was unemployed.

Mr. Kennedy: Well Counsel, this may help some to obviate that objection. We have had here, your Honor—we have here a person who is familiar with the authorities, who could authenticate that it is Mr. Gonzales', so if your Honor desires, we can produce that witness.

The Court: The objection of the authenticity and the foundation is well taken.

Mr. McMurray: Not to the authenticity of it as a document, your Honor, but the foundation; in other words, it is offered, I take it, to show that Mr. Gonzales was out of work for certain periods of time.

The Court: It is merely some evidence of his work record, and in some respects bears out his contention in his own case; for example, it shows here the period that he was expelled erroneously.

Mr. Kennedy: That is correct.

[fol. 115] The Court: It is endorsed on here, the period between 6/26/50 and 11/21/50, apparently the union took the position when he was expelled by union action, that he was expelled.

Mr. Kennedy: That is correct.

The Court: Apparently, they sought to correct that and reinstated him, and that portion would certainly indicate that. Well, it is cumulative and corroborative of the testimony that's already been offered.

Mr. Kennedy: I think, your Honor, the particular significance of that, and I might state—

The Court: I will say this—without interrupting, to expedite matters—if Mr. McMurray will stipulate that if a union official took the stand in charge of these records, the custodian, and testified that they were union records kept in the usual course of business, he would concede that the foundation would be laid.

Mr. McMurray: Yes, I would.

The Court: I would then overrule the objection and admit them as to their materiality.

Mr. McMurray: All right, your Honor.

The Court: This will be received as Respondents' Exhibit next in order.

The Clerk: E.

(Whereupon, union record of Petitioner Gonzales was marked Respondents' Exhibit E and admitted in evidence.)

[fol. 116] By Mr. Kennedy:

Q. Mr. McGraw, I hand you Respondents' Exhibit E and direct your attention to the lower right-hand portion of that exhibit where there are symbols commencing with December of 1951, going through November of that year, and ask you whether or not the notations opposite that date, indicate that dues were accepted by Lodge 68 for that period?

A. I take it, Counsel, you are referring to the column that is headed by "Amount"?

Q. That is correct.

A. That does indicate the amounts that were paid, for what periods they covered, and where you see "O.W." and in cases say 30 cents, 20 cents, 10 cents, it indicates that he received and he paid for and received out of work stamps that were issued in accordance with our constitution and by-laws.

Q. And what is the significance, if any, of the out of work stamps with relation to the employment of one of the members of Lodge 68?

Mr. McMurray: I will object to that, your Honor. It goes to the form of the question. I have no objection to the question which would elicit the practice, but—

The Court: Doesn't the record speak for itself?

Mr. Kennedy: Well—

The Witness: Well, your Honor, as a matter of explanation, in order to be eligible for an out of work stamp—he might be ill or he may have recorded himself as out of work. This does not distinguish between those two. It only indicates that the Lodge had reason to believe, on representations made to it or from his records, that he was not available for work and not employed.

Mr. Kennedy: That is all. Thank you, Mr. McGraw. No further questions.

Mr. McMurray: No cross-examination.

The Court: All right, you may step down.

The Witness: Thank you.

Mr. Kennedy: I'd like to call Mr. O'Hara.

BERNARD O'HARA, called as a witness by and on behalf of the Respondents being first duly sworn, was interrogated and testified as follows:

The Clerk: What is your name and address?

The Witness: Bernard E. O'Hara.

The Clerk: Where do you live, Mr. O'Hara?

The Witness: 448 Taraval Street.

Direct examination.

By Mr. Kennedy:

Q. Your full name, Mr. O'Hara?

A. Bernard E. O'Hara.

Q. And what is your residence?

A. 448 Taraval.

Q. During the year 1952, Mr. O'Hara, what was your occupation?

A. Dispatcher.

Q. For what organization?

A. Lodge 68.

Q. And I take it you are also a member of Lodge 68?

A. Yes, sir.

[fol. 118] Q. How long have you been?

A. Eleven years.

Q. You say you have been a member for eleven years, is that correct?

A. Yes.

Q. Mr. O'Hara, you know the Plaintiff in this matter, Mr. Gonzales, do you not?

A. Yes, uh-huh.

Q. Now, after August, 1952, can you state whether or not Mr. Gonzales applied or in any way made any representations to you that he wanted to be sent out to work in his usual places of work, or where he is capable of work?

A. August, 1952?

Q. Well, after.

A. After August?

Q. Yes.

A. No.

Q. Were there any other dispatchers at Lodge 68, during 1952?

A. No, just day in and day out—maybe I was sick or something like that, one of the other officers.

Mr. Kennedy: I believe that is all.

Cross examination.

By Mr. McMurray:

Q. Mr. O'Hara, how does one member of Lodge 68 get a dispatch to a job?

A. Well—

Q. In a period since August of 1952?

A. He would automatically come in and put his book down and say he wanted to be dispatched to a certain place, whichever it might be.

[fol. 119] Q. And you mean that before he could ask to be dispatched to a place he would have to know a particular job and ask to be dispatched to that one, is that it?

A. Well, as a rule the jobs came into the office requiring so many men, and the men come in and would present their books and be given clearances to go to work.

Q. Well now, how would a man, suppose I was a member of Lodge 68 and I didn't know about any particular job that was open and I hadn't been told by an employer about a job, how would I get assigned to one of those jobs that you had open?

A. You would ask me if there was a job open and I would tell you.

Q. And I would have to be in the hall, then?

A. That's right.

Q. And if I weren't in the hall, I would never be assigned to a job, is that it?

A. No, no, if you weren't in the hall and I had a work card for you, why I would automatically call in rotation as the cards came.

Q. If you didn't have an out of work card for me, you wouldn't call?

A. That's right.

Q. So you dispatched members of the union who were not present in the hall, by sending them notice that there was a job open?

A. Telephone to them, yes.

Q. Telephone?

A. Yes, uh-huh.

Q. And did you have an out of work card for Mr. Gonzales [fol. 120] during that period?

A. No.

Q. Now, do you dispatch at all times during the day, or do you have certain times for dispatching?

A. 8:30 to 5:30.

Q. And how do you regulate the dispatcher—how do you regulate the dispatch of men, that is, between those who haven't come into the hall and telephone and those who are present in the hall?

A. Well, as a rule, when a job comes in, the men that are in the hall usually get the clearances.

Q. And the men who are out of the hall and have out of work cards in, they don't get any, unless there aren't enough men around the hall?

A. If they are registered, yes, because the minute I get all of the men in the hall working, I automatically start to call the ones that are registered.

Q. Do you keep records of machinists who are not members of the union, out of work cards for machinists who are not members of the union?

A. No.

Q. And during a period before August of 1952, were you dispatching then?

A. Yes.

Q. And did Mr. Gonzales come in for jobs, during that period from March of 1952?

A. I think once in February or March—I don't remember just what date it was.

Q. He came in one time that you remember?

A. Yes.

[fol. 121] Q. And did you dispatch him?

A. Yes.

Q. Where did you dispatch him to?

A. Pacific Ship Repair.

Q. And was that—can you state more definitely when that was? Was that the best you can recall it?

A. Well, that would be pretty hard to do. After all you are dealing with a thousand men—to remember one man on one particular day would be too much.

Q. So—

A. If I remember rightly, it was sometime in February, either February or the first part of March. I don't remember just when it was.

Q. And between the time that you dispatched him on that job and August of 1952, did you dispatch him for any jobs?

A. No.

Q. And did you have an out of work card for him?

A. No.

Q. Did he ask you to be dispatched to any jobs?

A. No, no.

Q. You deal with thousands of men there, you say, and you can't remember any particular man?

A. Well, I remember this particular case, yes, in a case like that.

Q. You do?

A. Uh-huh (Affirmatively).

Q. I mean, do you remember that Mr. Gonzales didn't come in?

A. He came in and talked, yes.

Q. He came in and talked?

A. But—

[fol. 122] Q. As a matter of fact, he came in frequently and talked to you, didn't he?

A. Oh, I'd say maybe once a week, two weeks, three, something like that.

Q. And he discussed with you the fact that he was unable to get a job and there was work available for him at several different plants here, Wagner-Neihaus, and Pacific Ship Repair and others, did he not?

A. No.

Q. He asked you to send him out to a job, didn't he?

A. No.

Q. Now, you knew that he wasn't working during that period, didn't you?

A. Yes.

Q. And you knew also that he had been expelled from the union, didn't you?

A. Yes.

Q. Now, is it your testimony, Mr. O'Hara, that he came up there and talked to you about once a week during that period, but he said nothing about being dispatched to a job?

A. That's right.

Q. What did he talk about?

A. He just come in and part of the time he didn't talk to me at all. He was talking, there's other men in the office, it's a little square office, maybe six or eight foot square, maybe six or eight fellows in there, there was lots of times that he didn't talk to me at all.

Q. During the occasions when he talked to you, what did he talk to you about?

[fol. 123] A. Mostly just the time of day.

Q. You mean what time it was?

A. No.

Q. What did he talk to you about?

A. Just discussing the pros and cons of the day, nothing pertaining to work.

Q. Nothing pertaining to work?

A. No.

Q. Did you have any other functions than a dispatcher during this period?

A. No.

Q. And it is your testimony that at no time during the whole period from March of 1952 to the present date when he came in and talked to you, did he ever even mention work, or being dispatched to work?

A. That's right.

Q. How did you know he was unemployed?

A. Well, the last——

Mr. Kennedy: Excuse me. I think that assumes something that is not in evidence.

The Court: Ask him first, if he knows.

Mr. McMurray: I did ask him and he's already testified that he did know. How did you know it, sir?

A. I did, he was expelled and naturally coming up as an expelled member, he wouldn't be entitled to work.

Q. You knew that he was not working, then, because he was expelled?

A. That's right.

Mr. McMurray: That is all. Thank you.

Redirect examination.

By Mr. Kennedy:

Q. Mr. O'Hara, were there occasions when non union [fol. 124] men would come into the hall, already, who had received or stated that they had jobs with employers that were cleared by the union, or sent by the union, back to the employer?

A. I don't get what you mean.

Q. Well, were there occasions when there were men that didn't belong to the union, that were sent by the union out to work, if the men had obtained the jobs for themselves?

A. Yes.

Q. And can you remember offhand, any examples of that where you sent non union men out to jobs?

A. Well, we done quite a bit of that type of work with Bethlehem Steel.

Q. Did Mr. Gonzales ever come in during the time when you were dispatcher and tell you that he had a job with any employer?

A. No.

Q. For you to send him out?

A. No.

Q. And with reference to your statement that since he didn't belong to the union, that he had no right to work, did that—what is the significance of that comment with respect to if he had already obtained a job from an employer, was it your testimony that that meant that he didn't have any right to work because he didn't belong to the union?

A. No, I wouldn't say that.

Mr. McMurray: Your Honor, I will object to that question. He is not entitled to cross-examine his own witness [fol. 125] and not entitled to ask him too—

The Court: Well, there doesn't seem to be any conflict here, does there, gentlemen? The union took the position that he was expelled. They wouldn't have given him any employment, as I understood it, even if there was some available during that period.

Mr. Kennedy: Your Honor, I think that is the very crux of this thing.

The Court: Except as a non union member, you mean?

Mr. Kennedy: The crux is concededly, he is being denied the advantages of the union.

Now, the advantages of the union, I think, would be that they dispatched union jobs to members that they knew of, but non union members, the union would send men out to jobs, if they had secured the jobs from the employer, and I was asking this witness to explain his testimony by way of the fact I thought it was misleading, which at least to me, it was—

Mr. McMurray: You want to explain away his testimony.

Mr. Kennedy: Explain the correct impulse.

The Witness: Well, it is customary—

Mr. McMurray: Well—

Mr. Kennedy: Excuse me. There is an objection.

The Court: Well, I will overrule the objection.

The Witness: It is customary that when a man goes out [fol. 126] and secures a job for himself, that he comes in with a letter, he is automatically cleared to the job, to go to work. Now if a man doesn't come in with a letter, he isn't cleared, that is for sure.

The Court: But that is, if he is a union member.

The Witness: No, the case of the non union member.

The Court: Well, do I understand—of course, you took the position that Mr. Gonzales was not a union member after he was expelled.

The Witness: Uh-huh (Affirmatively).

The Court: But would you have consented to his employment as a non union member during that period?

The Witness: Well, if he had come in with a letter, that would have been a question.

The Court: If he had come in with a letter that he had a non union employment, you would have presented it to the union.

The Witness: That's right.

The Court: Did you yourself have the authority to make that decision?

The Witness: No.

Mr. Kennedy: That is all.

Recross examination.

By Mr. McMurray:

Q. That is to say, Mr. O'Hara, that you would not, yourself, have dispatched him to a job if he had brought in a letter from an employer?

[fol. 127] A. I couldn't. I didn't have the authority to do it.

Q. Now, Mr. O'Hara, did Columbia Steel—did you ever dispatch non union marine machinists for work as marine machinists, to Columbia Steel during the period of March 1952 to the present time?

A. Yes.

Q. They didn't use marine machinists, did they?

A. Yes.

Q. But there was no work for marine—for non union marine machinists to which you dispatched them during that period, is that it?

A. That's right.

Q. And during that period, did you dispatch non union men to the employers who use marine machinists, the ship repair, employers and other employers who use marine machinists—did you dispatch any non union marine machinists to any jobs of that sort or to any such employers?

A. Not without a written request from the company, no.

Q. Well now, with a written request from the company, did you dispatch such?

A. Yes.

Q. Who did you dispatch?

A. Well, I wouldn't know offhand, the names. The records are in the office.

Q. Did you regularly dispatch non union marine machinists to ship repair jobs in similar work?

A. Only in cases of where we couldn't supply them from the union membership.

[fol. 128] Q. So that if there was a request from an employer with a letter that you supply a particular non union man for a particular work, that you couldn't fill otherwise, then you were sometimes authorized to dispatch such a man, is that it?

A. That's right.

Q. And you took that up with the union, did you?

A. Well, the senior business agent.

Q. The senior business agent?

A. Uh-huh (Affirmatively).

Mr. McMurray: That is all. Thank you.

Mr. Kennedy: I have no further questions. Thank you.

Your Honor, Defendants and Respondents rest.

The Court: Defendants and Respondents rest?

Mr. Kennedy: Yes.

The Court: Perhaps to expedite things, if you will so consent, Mr. Kennedy, to take Mr. Gonzales' testimony per-

taining to the matter contained in his motion to amend the petition, subject to a motion to strike, and if I should conclude that the amendment ought not to be granted, I will, of course, disregard that evidence and grant the motion to strike.

Mr. Kennedy: Yes, your Honor, and—

The Court: So that we can conclude the matter today.

Mr. Kennedy: I take it it will be understood, or could it be stipulated, I will make the motion—

[fol. 129] The Court: I am assuming that the motion was filed to amend.

Mr. McMurray: Yes.

The Court: You tell me you have filed it.

Mr. McMurray: Yes, your Honor.

The Court: And it didn't get into the proceedings, assuming that the motion has been made, I will take the motion under advisement and permit evidence to be introduced at this time, under the proposed amendment, subject to a motion to strike, in the event that I should deny the motion to amend, and I will consider that you have made a motion to strike.

Mr. McMurray: Mr. Gonzales, will you take the stand.

MARCOS GONZALES, recalled having been previously duly sworn, resumed the stand and testified further as follows:

Direct examination.

By Mr. McMurray:

Q. Mr. Gonzales, for how long have you been a marine machinist, roughly?

A. Roughly since '21—1921.

Q. Since 1921?

A. I think '20 or '21.

Q. And you have been a journeyman machinist and member of Lodge 68 for about how many years?

A. Well—

Q. Since what date?

A. Since '38 or '40, I believe—yes, '39 or '40.

[fol. 130] Q. Since 1939 or 1940, and during that time, you worked here in the Bay Area, as a marine machinist, did you not?

A. Yes, sir.

Q. Do you have a family?

A. Yes, sir.

Q. Of what does your family consist?

A. Two boys and my wife.

Q. And you have supported your family, did you?

A. Yes, sir.

Q. And you raised the boys to manhood?

A. Yes, sir.

Q. Now, Mr. Gonzales, after your expulsion from the union, the International Association of Machinists here, you were unable to obtain work, is that right?

A. Yes.

Q. You sought work several places—you have already testified?

A. Yes, sir.

Q. And you were turned down?

A. Yes, sir.

Q. By the employers there. Now, you have testified that you applied at the union hall for dispatchers of employment?

A. Yes, sir, and quite a number of times I applied.

Q. Was that after March of 1952?

A. Yes, I was around there pretty frequent, and I talked to the dispatchers, but the previous dispatchers there, they were all—Charlie Truax, he is correct, you know, and I was on the black list right through all that time.

[fol. 131] Q. Did you ask to be dispatched?

The Court: Did you want that—

Mr. Kennedy: I was going to move to strike that.

The Court: All right, I will strike that, reference to Mr. Truax.

By Mr. McMurray:

Q. During that period from March, 1952, after that period, did you ask to be dispatched, ask any of the dispatchers at the union hall, to be dispatched?

A. Yes, sir.

Q. And did you ask Mr. O'Hara to dispatch you?

A. Yes, I talked to him many times in regard to jobs, but he told me his hands were tied. Many a times, I talked to him, I was getting by pretty low, then, and I had to go down that bakery—down that Fitzpatrick Bakery and buy my bread, and take home, and I stopped there in the afternoon and I know that is the only chance to get out, I figured that is a good chance, sometimes there'd be calls for a number of machinists and nobody around the halls, but I'd stay there a number of times and I'd still be turned down—sometimes an hour or two.

Q. Did you ask to be dispatched?

A. Oh, yes.

Q. Mr. Gonzales, did this, your consequent expulsion, have any effect on you, as far as feeling about yourself, your position in the world is concerned?

A. Why certainly. If I hadn't walked home from the [fol. 132] hall, I used to walk home and used to walk to the hall, I was getting pretty low, so I had to squeeze everything I had.

Q. What do you mean you were getting low?

A. I was low in my finances, and I used to walk down to the hall and walk home, and I'd come down and beg, more or less, to see if there was a possibility of getting some employment.

Q. You had some money saved, did you, before this expulsion?

A. Why certainly, I had quite a bit saved, but I had consumed all that.

Q. You consumed all that, you say?

A. Yes.

Q. Why did you consume that?

A. Well, to live, to live on and pay my bills.

Q. After you were expelled from the union, that is?

A. Yes.

Q. And what effect did this have on your attitude, if any?

A. Why certainly, I wasn't living right. I was just existing. I was losing weight right through, and I was worried and I was just run-down, until finally I cracked up. I just

couldn't stand it anymore. I caught a bad cold, and all of that, and that developed this condition that I am today, which I am still in the hospital.

Mr. Kennedy: Now your Honor, excuse me, the testimony that the witness just gave, I submit, is within the realm of expert medical testimony and he stated his conclusion as to what caused his condition. I move to strike [fol. 133] that on that ground.

Mr. McMurray: Well, a man can testify about his own physical condition.

The Court: Yes, but what caused it is objectionable. Did he say he believed that that caused it?

Mr. Kennedy: That is correct, as I understood it.

The Court: I will strike the answer.

Mr. McMurray: All right, I think that the—

The Court: The witness can say—

Mr. McMurray: I will get at it again.

Q. Mr. Gonzales—

The Court: That is his conclusion, whether or not—

The Witness: Your Honor—

The Court: Just a minute now.

By Mr. McMurray:

Q. Mr. Gonzales, you say that you were worried, though, you were worried?

A. Yes, I was worried.

Q. And you say you developed colds, is that correct?

A. Yes.

Q. And after this had been going on for sometime, you developed a cold which hung on and developed into pneumonia, is that right?

A. Yes, and pleurisy.

Q. And finally into pleurisy, so that you landed in the hospital?

A. That's right.

Q. Now, did you have anything besides your own savings [fol. 134] on which to live during the period you were unemployed after your expulsion?

A. I had my boys' savings.

Q. Your boys' savings?

A. Yes, he was called back into the Army so he let me have all that, his money, so we can get by on and we still get a check from him every month. He sends home a check to his mother.

Q. And you used your son's savings, is that right?

A. Yes, sir.

Q. And that was after your own savings had been exhausted?

A. Yes.

Q. And how old are you, sir?

A. I am going on 54.

Q. You had been putting this money by, I suppose, in anticipation of your eventual retirement?

A. Yes.

Q. And did the exhaustion of your savings before you were old enough to retire, did that affect you?

A. Why, it cost me plenty of worry.

Q. And the use of your own son's savings, did that affect you?

A. Yes.

Q. In what way?

A. Well, it just made me feel—well, like I had my boys supporting me now and I didn't—I had been well enough that I was always supporting my family, and the—it kind of made me feel kind of low down, low, that is, cheap in [fol. 135] other words. I never liked to live off my children.

Q. When you were a member of Lodge 68, you were an official of that union, were you not?

A. Yes.

Q. Member of the Board of Trustees?

A. Yes, Executive Board.

Q. And as such, you were well known to the members of the union, were you?

A. Yes, I was always on the policy committee.

Q. And when you went to the hall, I suppose you were greeted by other members of the union as a—not only a member of the union, but an official of the union?

A. Yes, sir, I was well liked by all the boys. I showed it in my elections.

Q. And after your expulsion, was there any difference in your attitude, or their attitude toward you when you went around the hall?

A. Why, yes, they looked down on me, that I was incapable of getting my work and even—you see, we had two tickets, we had a blue ticket and a white ticket and administration ticket, so the administration ticket used to fall back on me and test me about it, look at your blue ticket, look what it is down there, they are not supporting you, they are letting you down, and they just kept hammering at it to me. They told me, why don't you go up and see so and so and so? He will get you on the job. He says, they will reinstate you right away, providing you sign some [fol. 136] affidavits. I refused to sign any affidavits, and that caused me plenty of trouble.

Mr. Kennedy: If I may interrupt you, I move to strike this answer on two grounds, primarily it states the conclusion—the first part was purely conclusionary, and the second part is objectionable on the ground it is phrased as to “they said” and so forth, as uncertainty.

The Court: It is stricken.

The Witness: Well I can——

The Court: Just a minute now.

By Mr. McMurray:

Q. Mr. Gonzales, when you went to the hall, did you feel that there was a difference in the attitude of the men there?

A. Yes.

Q. And did you have numerous conversations with men there in which they poked fun at you because your expulsion and the fact that you were no longer being supported by your former supporters of the union?

A. Yes.

Mr. Kennedy: I am going to object to that as too indefinite, your Honor.

The Court: Sustained.

By Mr. McMurray:

Q. Mr. Gonzales, can you recall any of the people who were—with whom you had conversations on this subject of your status, after your expulsion?

A. Oh, yes, the new—

[fol. 137] Q. Will you tell us who some of the people were?

A. Why, yes. William Davis was one and Frank Britten, the waterfront dispatcher—I mean, waterfront business agent—I talked to him about it, and they all told me that their hands were tied; also, the Treasurer, Mr. Risconi, he is a secretary—they have officers there as well.

Q. Can you recall any conversation in which you were told that your administration ticket or your ticket let you down, they could not give you assistance, and so on?

A. Oh, yes, you mean—

Q. With whom did you have that conversation?

A. Oh, that was another dispatcher, the other dispatchers that were there, George Simi.

Q. Simi?

A. Simi, he was the head business agent, and then the—I can't recall now—the dispatcher at that time, too—it was Ed Conlin, Eddie Conlin, he was dispatcher and also Mr. Griffin—I talked to quite a number of them, but Mr. Griffin has passed away now. I talked to pretty near all the other administration officers. I talked to Mr. Wagner. I talked to him for quite awhile—John Wagner.

Q. Now, Mr. Gonzales, the occasion in which you say you were kidded, teased about your status and the fact that you were not getting support from the members that had formerly supported you, let's direct your attention to that.

A. Yes.

Q. Do you remember, did that sort of a conversation occur [fol. 138] once or more than once?

A. More than once, everytime I was around the hall they were always twisting it in front of me.

Q. This was sort of in the nature of a continuing conversation that occurred everytime you went down there or nearly everytime you went down there?

A. Yes.

Q. And can you recall any of those particular conversations that you had during that period? Can you state when and with whom you had such conversations?

A. Well, one of them, Mr. Simi.

Q. When did you have the conversation with him?

A. That was prior to elections. That was in—I think just before we had the other ticket to come in. I don't know if it was '51 or '52 but it was Mr. Simi.

Q. I am referring to the period after your expulsion in March, 1952. Now, did you have any such conversations after March, 1952?

A. Not with Simi. I had with John Wagner up in the hall.

Q. John Wagner. Who is he?

A. John Wagner, he was a business agent then, but he was defeated.

Q. He was at that time, a business agent?

A. No, he was defeated. He was——

Q. He was an ex-business agent?

A. Ex.

Q. All right, who else was present?

[fol. 139] A. And——

Mr. Kennedy: Your Honor—excuse me—I am going to object to any further line of this testimony as being just too remote on any of the issues that Counsel is presenting. It has to do with conversations between union members and I can't—if he states briefly, or it seems to me he could state if he is worried or anxious, and so forth, and this other seems to be too far afield to have any particular significance.

Mr. McMurray: I am going into it, your Honor, because counsel objected to the testimony as too indefinite when I attempted to——

The Court: I take it you are trying to show humiliation?

Mr. McMurray: I am, your Honor, yes.

The Court: Well, Counsel says he makes no objection to your asking the general question whether he was humiliated. Is that it?

Mr. Kennedy: It seems to me that that would be the way to approach it. I certainly don't—I apologize for suggesting how things should be done, but I also might object on another ground, also, but——

The Court: Well, how else would you show humiliation except by what people said or did to him and his reaction to it?

Mr. Kennedy: I think you could show humiliation, and [fol. 140] I am not trying to be facetious here, in circumstances that were intrinsic-ly humiliating. I think these are very equivocal. They suggest other lines of inquiry, and they are not self-definitive as being humiliating. He stated he is kidded and he had conversations that people didn't support—

The Court: I think you are correct. I think those are conclusions again. We are back to how a person interprets—whether or not he was humiliated is a fact under the proposed amended pleading, whether I considered certain conduct directed to him and his reaction to it as humiliation, but once again, we are back to the thick skin, I suppose. It is for me to conclude whether a person would be humiliated by certain observations, losing an election may be humiliating and may not. I don't know. But certainly I have never had the experience, fortunately, but I can see where it could be humiliating, and also be distressing. He is talking now mostly with reference to the fact that a certain ticket which he was on, had lost out, and that may be beyond the issues in this case.

Mr. Kennedy: That was the specific thing that prompted me—

The Court: I think your objection is well taken to that. I think that he should be confined, Mr. McMurray, to what the expulsion did to him.

Mr. McMurray: I intended to confine the question to that.

[fol. 141] Q. Mr. Gonzales, will you bear this in mind, these questions that I am asking you now to have to do with what occurred after the expulsion and after your experiences which resulted from the expulsion. Now, you mentioned the conversation that you had after your expulsion.

A. Yes.

Q. With the man who had formerly been a business agent. What was his name?

A. John Wagner, and the other man was Eddie Conlin. He was a dispatcher at that time—Eddie Conley.

Q. Where did this occur?

A. Right in the hallway, he usually gets around there.

He come in to pay dues for a bunch of boys, and so I met him in the hall about 3:00 o'clock.

Q. In the union hall?

A. Yes, and then Eddie Conlin happened to come in and walked downstairs and they begin ribbing me and telling me about my situation.

Q. What did they say?

A. Well, they said, "There you are. You have your boys in there now." He says, "Now, what can they do for you?" He says they just—I was always on the wrong side of the fence. He says, "You should have listened to us and stayed with us," and so forth. That is John Wagner, and Eddie Conlin telling me the same thing. He says, "Those fellows are just contrary." They just razzed me about them and he told me that they never send me out on a job because. [fol. 142] Eddie Conlin, once in awhile, he sneak me out on a job. He used to give me a dispatch, and he says, "You see, I used to give you a job, and I let you work once in awhile; these other fellows don't do it." I says, "That's all right." I says, "Eventually the truth will all come out and I will take it as I have been taking it," and I says, "It can't be any worse now and I will just suffer the consequences."

Mr. Kennedy: Excuse me. I feel that his conversations in any—

The Court: Yes, I will strike it.

By Mr. McMurray:

Q. Now, were you allowed—were you admitted into the union hall at all times after your expulsion?

A. Yes.

Q. Were you ever thrown out or told to get out after your expulsion?

A. No, sir.

Q. You were allowed to come in?

A. Yes.

Q. And you frequently went down there among the men that you had associated with before your expulsion?

A. Yes.

Q. And was it a matter of discussion and common knowl-

edge there, that you were unemployed because of your expulsion?

A. Yes. They always talked to me about that.

Q. And as a machinist, had you been unemployed during the past several years when you were physically able to work?

A. Well, I was yes, prior to this time, a couple of— [fol. 143] several times on account of injuries on the job, and other times, because I was on what they call the black list, and that is one thing I fought so, before the Executive Board, to bring these jobs up and throw them out to any man that is in the hall. I argued that point whereby no more of this tabling these jobs that are called in because I proved it there before the Executive Board that I was black listed, and once I had George Ingles from the Triple A Machine Company, I and three other boys went down there, and we used to go up to the hall.

Q. Just a minute, Mr. Gonzales. Let's get back to the thing here that we are interested in. When you were able to work—

A. Yes.

Q. —during the several years before your expulsion, your expulsion was in 1952?

A. Yes.

Q. During 1952—1951, 1950, when you were physically able to work, had you been unemployed?

A. No.

Q. And during this period, did you have any other source of income than what you were able to earn yourself?

A. No.

Mr. McMurray: I think that is all, your Honor.

Cross examination.

By Mr. Kennedy:

Q. Mr. Gonzales, I believe at the last hearing you said you were in the hospital?

A. Yes, I still am.

[fol. 144] Q. You are still in the hospital, and I don't recall, but I think you stated when you first went in there, what date was it?

A. Last day of—I think it was June 28th.

Q. Of 1953?

A. Yes.

Q. Now did I understand you, or was it your testimony that you were working steadily in 1949 and 1950?

A. No, because I just said that I had a couple of—I believe I was injured a couple of times, around once or twice there, I got hurt on the job, and I was off for a little time, personal injuries.

Q. Now, going back to say, June of 1950, now you remember that this trial that you had was in August of 1950, did you remember—or I will say June of 1949, so for a year before that you were tried even by the local, isn't it a fact that you were working very irregularly then?

A. Yes, I just said why I stated my reasons, I was working irregular all the way through since the new—Charlie Truax took over the lodge.

Q. But you were a member in good standing, in the union?

A. Yes, but I know, but there was so many—so much going on I happened to know when they were bringing in forty or fifty members when we had seventy unemployed, and I objected to all that.

Q. It is also true that you were working very infrequently after this trial which was in August of 1950, up until March [fol. 145] of 1952, although during that period, you were also in good standing as far as the local union went, isn't that correct?

A. All of that time while the other administration was in there, I was working irregular. I wasn't on, just getting these little two by four jobs most of the time there.

Q. But they were taking your dues?

A. Oh yes, they took my dues.

Q. And would you say that you continued to work just as irregularly after this trial as for a year—

A. The trial at that time, in '50?

Q. Yes.

A. Well, I was expelled twice.

Q. But after the August 1950 local trial, you still went up to the union hall and you still submitted your dues, did you not?

A. Yes, sir.

Q. And during that period for substantially a year before 1950 and up to March of 1952, or at least until November of 1951, for each one of those months you took an out of work stamp or paid for an out of work stamp, didn't you?

Mr. McMurray: I am going to object to the question as unintelligible.

The Witness: Yes, but a couple of times—

The Court: Do you understand the question?

The Witness: Well, yes, I claimed that I got—wasn't employed up to 1950, and during that time I was injured. I stated that I was injured several times and I couldn't be [fol. 146] employed, I was injured, but I was on compensation.

By Mr. Kennedy:

Q. Now when was it, Mr. Gonzales that these union officials stated that their hands were tied? Was that—and that they couldn't send you out to a job, was that immediately after March of 1952?

A. Yes, that was after the elections when we had the new administration in there.

Q. Well, I think—I may not have been clear there.

A. Yes.

Q. You remember that in March of 1952, there was what we call the final action, the local notified you they wouldn't take dues anymore, and you were no longer a member in good standing?

A. That's right.

Q. At that time you received formal notification that you were no longer in Lodge 68?

A. That's right.

Q. Now what I am get-ting at now is how long after that did the union officials tell you their hands were tied, that they couldn't send you out to any jobs?

A. Why, it was right on March 5th, when I met Frank—he is a union official, he is a business agent—and I talked to him when they wouldn't take me back. I had laid off—I was off about a week and a half, and I had medical, that is, doctor's certificates whereby I was capable of going back to work, and at thtt time they hired a couple of new men and

[fol. 147] there was a call, four men I knew, so I went down there.

Q. At any rate, right around there?

A. No, it was March 5th I talked to Frank in regards to why I couldn't continue my job.

Q. There was—

A. He said, "You can't."

Q. That answers the question. Now, and then the only other thing I want to ask you about that is: Is that after that you still were back at the union hall once a week or more frequently?

A. Well sometimes I'd be there two times; sometimes I'd leave it, go the following week, but I usually went up there pretty often.

Q. And you continued to go until in mid 1953 when you went into the hospital?

A. Oh, yes, I was up there, I believe about a week—four or five days before I went to the hospital.

Q. I see.

A. That was the last time that I have been up there, see if I can get some employment.

Mr. Kennedy: That is all, thank you.

Redirect examination.

By Mr. McMurray:

Q. Mr. Gonzales, you were injured and disabled on February 17th, 1944, were you not?

A. Yes.

Q. While you were working on the job?

A. Yes.

[fol. 148] Q. And again in June of 1946?

A. Yes.

Q. And then injured again on June 25th, 1949, were you not?

A. Yes, sir.

Q. And again on January 1st, 1951?

A. Yes.

Q. And on February 5th, 19—no—yes, February 5th, 1952, you had another injury?

A. Yes.

Q. These injuries were to your back for the most part, were they?

A. Yes, sir.

Q. And they resulted in certain claims filed by you with the Industrial Accident Commission for workmen's compensation?

A. Yes.

Mr. McMurray: Your Honor, in view of the lateness of the hour, I wonder if it would be possible for me to confer with Mr. Kennedy after the trial so that with a view to preparing a stipulation showing the periods, as shown by the records of the Industrial Accident Commission, I have in my files here the periods during which Mr. Gonzales was unable to work, and received compensation in those cases. Now if I take the cases one by one, it is going to consume considerable amount of time, and I have the files here and they were rather lengthy, and Counsel would be in agreement with that and the Court would sanction it, I thought we might get this matter straightened out. It is a matter of factors, over which there can't be very much dispute at all, and [fol. 149] put in a stipulation.

Mr. Kennedy: As far as what the records of the Industrial Accident Commission show, I would not raise any question as to their authenticity or—

The Court: These are all before the expulsion?

Mr. McMurray: Yes, they are. It goes to the matter of the times during which the Plaintiff paid out of work dues.

The Court: In view of the fact that we let the other time sheet in, it probably would tie in with that to show—

Mr. Kennedy: If I may suggest this, it may save a little time and effort if you think it is agreeable—if this witness can approximate the periods that he was off work, it is perfectly agreeable with me, and I don't think a few weeks either way would have any significance if he knows in 1949 in June he was injured.

The Court: I think he's already testified to that, hasn't he?

Mr. McMurray: I believe that he testified to some of

that, but not for this purpose, so that probably it was not as definite as it ought to be.

The Court: Can you tell us what period you were disabled under workmen's compensation?

By Mr. McMurray:

Q. After June, 1949 injury, your Honor.

The Court: Yes.

By Mr. McMurray:

Q. Start there.

[fol. 150] The Witness: Your Honor, that is pretty hard to remember the time I was off.

The Court: Do those records show an exact date?

Mr. McMurray: Your Honor it would be possible to get them here, but I don't—it wouldn't be—

The Court: Well, would you stipulate, Mr. Kennedy that after looking at the records yourself, that whatever information Mr. McMurray gives to me in that respect, may be considered as evidence?

Mr. Kennedy: Yes, your Honor, with this thought: That in these cases usually there are two avenues, as I understand it, either there is a hearing held and an award is issued, or else there is a compensation paid for a certain period, and unless there was a hearing held, there wouldn't be any records.

The Court: I take it they are cases in which there were hearings?

Mr. McMurray: Yes, there were hearings and compensation was paid.

Mr. Kennedy: That would certainly be agreeable.

The Court: All right. So it is stipulated that whatever communication is directed to me by Mr. McMurray, to which you will stipulate I can consider evidence in this case—

Mr. Kennedy: Yes.

The Court: And it will be admitted as Plaintiff's Ex-
[fol. 151] hibit next in order.

Mr. McMurray: All right. With that then, your Honor, the Plaintiff will close the evidence admitted.

The Court: All right, is the matter submitted?

Mr. McMurray: I will submit the matter, your Honor.

Mr. Kennedy: Yes.

[fol. 154]

[File endorsement omitted]

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF
CALIFORNIA IN AND FOR THE FIRST APPELLATE DISTRICT

Division One

MARCOS GONZALES, Petitioner and Respondent,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, ETC., et al.,
Respondents and Appellants.

ORDER GRANTING PETITION FOR REHEARING—March 16, 1956

BY THE COURT:

The petition for rehearing is granted. Counsel are directed to brief the question of the applicability, if any, of the Taft-Hartley Act to the issue of damages. Appellant granted 10 days. Respondent granted 10 days thereafter to reply. Cause then to be submitted.

Dated March 16, 1956.

PETERS, P.J.

[fol. 155] IN THE DISTRICT COURT OF APPEAL, STATE OF
CALIFORNIA, FIRST APPELLATE DISTRICT

Division One

1 Civil No. 16,536

MARCOS GONZALES, Petitioner and Respondent,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, ETC., et al.,
Respondents and Appellants.

OPINION—June 12, 1956

The superior court rendered judgment reinstating petitioner in the International Association of Machinists and awarding him \$6,800 damages for loss of wages and \$2,500 for mental distress. All respondents¹ in the lower court are appellants here.

[fol. 156] QUESTIONS PRESENTED

1. Was petitioner excused from exhausting his administrative remedies?

2. Did the lodge violate the constitutions of the organization?

3. Are the International President's interpretations binding on the courts?

4. Damages: Does the Labor Management Relations Act, 1947, 29 U.S.C.A. § 141 et seq. (Taft-Hartley Act) apply?

¹ They are the International Association of Machinists, an unincorporated association, Thomas E. McShane, and A. C. McGraw, as International Representatives thereof; International Association of Machinists, Local Lodge No. 68, an unincorporated association, Robert Roller, as President of said Local Lodge, Reese Conte, as Secretary of said Local Lodge, Edward Peck, as Treasurer of said Local Lodge.

FACTS

This proceeding grew out of the recommendation in 1948 by petitioner, as a member of the investigating committee of the lodge, that one Nelson be denied admission to membership. Thereafter petitioner was physically assaulted by Nelson. Petitioner, believing that the assault was instigated by Charles Truax, who was the International Representative, filed suit in the superior court against both Nelson and Truax for damages for injuries received in the assault. A nonsuit was granted in favor of Truax and a judgment in favor of petitioner against Nelson for \$10,000. July 7, 1950, petitioner was tried by the trial committee of the lodge for violation of article XXV, section 1, Grand Lodge Constitution.² July 19th, the trial committee at [fol. 157] the regular bimonthly meeting submitted to the lodge its verdict—"guilty as charged," and its recommendation that petitioner be expelled from the association. Thereupon pursuant to article K, section 7 of the constitution, the membership present voted on the action of the committee.³ The vote was 43-31 against sustaining the verdict.⁴ August 2, 1950, at a regular meeting a motion was made to rescind the action of July 19th rejecting the verdict of the trial committee. A standing vote showed 38 yes, 4 no. Thereupon a secret ballot vote was taken on a motion to sustain the "guilty" verdict of the committee. This resulted in 31 yes, 12 no, and 2 blank ballots. A secret ballot vote was then taken on a motion to expel petitioner from the

² " . . . any member . . . circulating or causing in any manner to be circulated any false or malicious statement . . . falsely or maliciously attacking the character, impugning the motives or questioning the integrity of any officer of the Grand Lodge . . . " The charges were preferred by Truax and were based upon the allegations in petitioner's complaint in the civil action that Truax directed and ordered Nelson to perpetrate the assault and battery on petitioner.

³ This provides that the recommendation of the committee may be amended, rejected, or another punishment substituted by a majority vote of those voting. To expel, however, the required vote is two-thirds of those voting.

⁴ July 28, 1950, Truax appealed to the Grand Lodge from this action of the lodge. August 22d, he withdrew his appeal.

association as recommended by the committee. This resulted in 29 yes, 14 no, 1 blank. August 2d petitioner appealed to the International President from this action of the lodge, claiming among other things that the action of the lodge on August 2d, after his vindication on July 19th, was a violation of the constitution, and also that the vote for his expulsion was not the required "two-thirds ($\frac{2}{3}$) vote of those voting." November 13th, the International President sent a letter to the president and secretary of the lodge, in which he made formal findings, conclusions [fol. 158] and decision. He upheld the conviction of petitioner, but decided that expulsion was too severe a penalty and then modified the penalty to a fine of \$500 to be paid the lodge, and a "complete and appropriate apology" in writing from petitioner to Truax, copy thereof to be sent to the president. January 30, 1951, petitioner received a letter from the General Secretary-Treasurer of the International to the effect that on his appeal of the decision of the International President to the Executive Council that body had unanimously sustained the decision. "Accordingly, President Hayes' decision of November 13, fining you \$500.00, becomes the decision of the Executive Council, and our records have been so indicated." February 23, 1951, in reply to a letter from petitioner, asking the course to be followed in appealing the decision of the Executive Council, the General Secretary-Treasurer wrote petitioner calling attention to section 6, article XXV, of the constitution⁵ which provides for appeals to a convention of the Grand Lodge and stated that his appeal could not be sent to the convention nor considered by it "until you have carried out the decision of the Executive Council, which means you must pay the fine of \$500.00 before you can appeal to the

⁵ Before any appeal can be taken to the convention or to the membership, at large by referendum, "all orders of the Executive Council in relation thereto, must be fully complied with . . . and in no case shall . . . any . . . member . . . appeal to the civil courts for redress until after having exhausted all rights of appeal under the provisions of this Constitution." Section 10, article K, constitution, likewise requires that a member of a local lodge must exhaust all rights of appeal under the constitution of both the Grand Lodge and the local lodge before appealing to the courts.

convention." February 11, 1952, the lodge's financial secretary [fol. 159] notified petitioner that the lodge would no longer accept dues from him until he had complied with the president's decision by paying the \$500 fine and making a complete and appropriate apology to Truax. February 20th, petitioner formally refused to pay the fine or make apology. December 3, 1952, petitioner filed his application for a writ of mandate in the superior court.

Whatever confusion there may have been in this state as to the right of a trade union member to appeal to the courts for redress from his union's action, without first exhausting all remedies provided by its constitution and by-laws, such confusion has been resolved and a definite rule established in the recently decided *Holderby v. International Union etc. Engineers*, 45 Cal.2d 843 [291 P.2d 463]. There the plaintiff was expelled from the union in complete violation of the union's constitution. In holding that he could not appeal to the courts without first availing himself of the remedies provided in the constitution for a review by the general board of the action taken against him, the court refused to follow cases like *Weber v. Marine Cooks' & Stewards' Assn.*, 93 Cal.App.2d 327 [208 P.2d 1009], which had held that "where an organization has violated its own laws and arbitrarily violated a member's property rights the rule of exhaustion of remedies by appeal to a higher body within the organization need not be adhered to before direct resort to a judicial tribunal." (P. 338.) It then ruled that the union member must exhaust the union remedies before he may appeal to the courts, no matter what the [fol. 160] initial violation of union rules may have been, and that the only exception to the general rule is if there has been a violation of the rules on appeal. "It is only when the organization violates its rules for appellate review or upon a showing that it would be futile to invoke them that the further pursuit of internal relief is excused. The violation of its own rules which inflicts the initial wrong furnishes no right for direct resort to the courts." (P. 849.) Therefore we are limited to a determination of whether the union rules on appeal were violated in any respect or whether further pursuit of internal relief is excused.

1. *Administrative Remedy.*

Petitioner followed his administrative remedy through an appeal to the International President and then from his decision to the Executive Council. He did not proceed with an appeal either to the convention of the Grand Lodge or to the membership at large. He was barred from so doing by the requirement that he first fully comply with the orders of the Executive Council.

Petitioner contends that the International President and the Executive Council violated the union rules on appeal in deciding that the required two-thirds vote had expelled him and in changing the penalty from expulsion to a fine and apology. As to the finding of the president that there was a two-thirds vote in favor of expulsion, such finding, if erroneous, could not alone justify noncompliance by petitioner with the appeal rules of the organization. Just as a [fol. 161] court has the power to decide wrongly as well as rightly, the president on appeal likewise has such power and a wrong decision is not the violation of the organization's rules on appeal which under the Holderby case justifies the member in refusing to further follow the union's rules on appeal. The constitution provides (art. V, § 1) that the president shall decide all constitutional questions subject, however, to the right of appeal.* However, the imposition of an apology requirement would appear to be in a different category. Article XXV, section 1, the section which petitioner was charged with violating, provides a penalty of fine or expulsion, or both. That section is in the Grand Lodge constitution. In the local lodge constitution (art. K, § 7) it is provided that the membership may substitute another punishment for that recommended by the trial committee. It is questionable whether this gives the mem-

* Nor do we think that the president violated any rules in prescribing a fine *prior to approval* thereof by the Executive Council. Section 8, article K, provides that no fine in excess of \$50 "shall be imposed upon any member . . . unless the same is first approved by the Executive Council." Having in mind that under the appellate procedure an appeal is first to the president and thereafter to the Executive Council, and that this provision is in the constitution of the lodge and not in that of the Grand Lodge, it is obvious that it does not apply to a decision on appeal.

bership the right to substitute any penalty other than that included in the phrase "fine or expulsion or both" in the penalty section of the Grand Lodge constitution. However, we can find no authorization to the president, upon appeal, to change the penalty voted by the lodge. It would appear that his authority is either to affirm or reject the action of the lodge, and in the event he affirms its action in finding [fol. 162] a member guilty but, as here, feels that the penalty is too great, he may reverse the penalty but the determination of the new penalty is for the lodge and not for him. It may be that had the president merely reduced the penalty to a \$500 fine, petitioner could not complain of a departure from the rules so obviously in his favor, as a fine is included in the penalties provided by the constitution. But the requirement of an apology is an entirely different matter. Nowhere is there a provision for such a penalty and it is completely outside the penalties prescribed. This action then constituted not only a violation of the organization's rules for appellate procedure but it brings the case under the second situation stated in the Holderby case, namely, "that it would be futile to invoke" the further appellate rules. They provide that to go further with his appeal petitioner must comply with all orders of the Executive Council. Thus to gain redress petitioner must pay a fine which the president and the Executive Council had no right to impose and to make an apology which neither had the right to require. While the fine money could be refunded if the convention were to reverse the Executive Council's decision, there is no way in which the apology could be wiped out. The effect of these requirements was to prevent petitioner from proceeding further and gave him the right to appeal to the courts for relief.

Appellants contend that the action of the Executive Council, in effect, eliminated the president's requirement of an apology. The General Secretary-Treasurer on January 30, 1951, notified petitioner: "Inasmuch as you failed to supplement your letter of November 16, the Executive [fol. 163] Council, at its recent meeting, carefully appraised all the facts as presented in the correspondence dealing with your case and, after due deliberation, by unanimous

action, voted to sustain the International President's decision: Accordingly, President Hayes decision of November 13, fining you \$500.00, becomes the decision of the Executive Council. * * * " (Emphasis added.) On February 23d he notified petitioner that an appeal to the convention, if made, could not be "processed" "until you have carried out the decision of the Executive Council, which means you must pay the fine of \$500.00 before you can appeal to the convention." On February 11, 1952, the financial secretary of the lodge notified petitioner that the lodge could not accept dues from him until he paid the \$500 fine *and made a complete and appropriate apology*, sending copy to the International President. "This is in accordance with the decision" of the president "and sustained by the Executive Council. * * * " It is difficult to understand how the Executive Council "voted to sustain the International President's decision" if it deleted therefrom the apology requirement. Certainly the lodge interpreted the action of the Executive Council as requiring the apology as well as the fine. At the trial counsel for appellants stated: " * * * it is true that in order to comply with the decision of the International President that the Plaintiff would have to pay \$500 and we don't dispute that at all, and *it also appears that he would have to make an apology.*" (Emphasis added.) In any event, as a result of the appeal brought by petitioner, he finds himself ousted from his union because of nonpay-[fol. 164] ment of dues, which he would pay but it will not receive, and denied his right of further appeal because he will not do something which the appellate bodies had no right to require him to do. It should be remembered that being ousted or expelled from a union is a matter of much greater consequence than expulsion from a fraternal organization. In the former case, in most instances it means a loss of a member's job, and therefore, his means of making a living. Especially is this so when employers of the type of labor provided by members of this organization only hire through the union hiring hall. At the very least, his no longer belonging to the union would be a serious handicap in the labor market.

The facts bring this case under the exception to the general rule of exhaustion of administrative remedy. We are

therefore required to consider whether the acts of the lodge violated the constitution of either the Grand Lodge or the local lodge.

2. *Lodge Violations.*

There is no provision in either constitution for rescinding the action of the membership in voting on the recommendations of a trial committee.⁷ Appellants support such action, however, by contending that the procedure was in accordance with Robert's Rules of Order and that the constitutions make those rules applicable. Article G, section 2 of the local lodge constitution provides: "The Rules of Order [fol. 165] governing parliamentary procedure shall be printed in the copies of the Constitution of the Grand Lodge, and no other rules shall apply." In these rules there is nothing upon the subject with which we are here concerned. Article II, section 11 of the Grand Lodge Constitution makes Robert's Rules of Order the parliamentary law of both the Grand Lodge and the local lodge "except in cases otherwise provided for by this Constitution." If there is any conflict between Robert's Rules and the provisions of either constitution the latter must necessarily prevail. (See *Harris v. National Union of Marine Cooks & Stewards*, 98 Cal.App.2d 733, 736 [221 P.2d 136].) The lodge constitution requires that voting on the recommendations of the trial committee be by secret ballot. It would seem to conflict with this requirement to permit a vote to rescind such action to be taken in a less formal way. Here it was taken by a standing vote. At the very least this violated the spirit of the constitution. Moreover, Robert's Rules provide (§ 10, subd. 5, p. 50, Robert's Rules of Order, Revised Seventy-fifth Anniversary Edition): "At any future session, the resolution, or other main motion, may be rescinded *in the same way if it had been adopted; * * **" (Emphasis added.) The action taken here violated that provision. We hold that attempting to rescind an action required to

⁷ Truax having appealed to the president from the action taken on July 19th, it is very doubtful if the membership under any theory could modify or rescind the action which was then on appeal.

be taken by a secret vote, by a standing vote, is a violation of the constitution and of the rules and was therefore void.

The action of rescission was taken in petitioner's absence. *Ellis v. American Federation of Labor*, 48 Cal.App.2d 440 [120 P.2d 79], holds (pp. 443-444): "It is settled however [fol. 166] in this state and elsewhere that a member of an unincorporated association may not be suspended or expelled, nor a subordinate body suspended or its charter revoked, without charges, notice and a hearing, even though the rules of the association make no provision therefor." While petitioner had notice of the proceedings up to the action exonerating him on July 19th, the action purported to be taken on August 2d was taken without notice and in his absence. The above mentioned rule would apply to such action. Such action violated "those rudimentary rights which will give him a reasonable opportunity to defend against the charges made. * * * The union's procedure, however, must be such as will afford the accused member substantial justice, and the requirements of a fair trial will be imposed even though the rules of the union fail to provide therefor." (*Cason v. Glass Bottle Blowers Assn.*, 37 Cal.2d 134, 143 [231 P.2d 6, 21 A.L.R.2d 1387].)

Moreover, the vote on the question of expulsion did not produce the required "two thirds ($\frac{2}{3}$) vote of those voting." There were 29 yes votes, 14 noes and 1 blank cast, or a total of 44 votes. The casting of a blank ballot is voting. To constitute a two-thirds vote of those voting it was necessary to get 30 votes. As only 29 affirmative votes were cast the measure failed and the attempted expulsion cannot stand.*

* While the trial court found that the action of petitioner in charging Truax in the civil action with directing and ordering Nelson to assault him violated article XXV, section 1, "falsely or maliciously attacking the character, impugning the motives or questioning the integrity of any officer of the Grand Lodge" (Truax was such an officer) we deem it unnecessary to consider this finding for the reason that by the action of the membership on July 19th in rejecting the trial committee's finding, the matter has become academic.

[fol. 167] 3. *President's Interpretation.*

Appellants contend that the president's interpretation of the constitutions as giving him the power to impose the fine and apology, in holding the rescinding action of the lodge as proper, and in determining that the blank ballot should not be counted in determining the votes cast, is binding upon the courts. This contention is based upon the rule set forth in *DeMille v. American Federation of Radio Artists*, 31 Cal.2d 139, 147 [187 P.2d 769, 175 A.L.R. 382]: "The practical and reasonable construction of the constitution and by-laws of a voluntary organization by its governing board is binding on the membership and will be recognized by the courts." But the construction placed upon such actions by the president in this case cannot be held to be reasonable under the circumstances. "A clearly erroneous administrative construction of a definite and ambiguous provision of the constitution cannot operate to change its meaning." (*Harris v. National Union of Marine Cooks & Stewards*, *supra*, 98 Cal.App.2d 733, 737; see also *Mandraccio v. Bartender's Union Local 41*, 41 Cal.2d 81, 85 [256 P.2d 927]; *Riviello v. Journeyman Barbers etc. Union*, 109 Cal.App.2d 123, 128-129 [240 P.2d 361].)

We are not impressed by the fact that the president stated in effect that his conclusion would not have been different if he were considering Truax's appeal from the first action of the lodge rather than petitioner's appeal [fol. 168] from its second action. It is only the latter situation with which we have to deal.

4. *Damages: (a) Jurisdiction.*

In determining the question of whether the exclusive jurisdiction to grant damages in a case of this kind lies in the Labor Relations Board, it is first necessary to determine the character of the pleadings and issues in this case. The petition alleged a breach of contract between the union and plaintiff, one of its members.⁹ It took the form of a

⁹ See *Harris v. National Union of Marine Cooks & Stewards*, *supra*, 98 Cal.App.2d at p. 736: "The constitution of the union constitutes a contract with the members * * *."

petition for writ of mandate because damages alone would not be adequate to restore to petitioner the things of value he had lost by reason of the breach. No charge of "unfair labor practices" appears in the petition. The answer to the petition denied its allegations and challenged the jurisdiction of the court, but said nothing about unfair labor practices. The evidence adduced at the trial showed that plaintiff, because of his loss of membership, was unable to obtain employment and was thereby damaged. However, this damage was not charged nor treated as the result of an unfair labor practice but as a result of the breach of contract. Thus the question of unfair labor practice was not raised nor was any finding on the subject requested of, or made by, the court.

So far as plaintiff's improper expulsion from the union is concerned, there could be no question of unfair labor practice:

[fol. 169] The Taft-Hartley Act prescribes in part: "(b) It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: PROVIDED, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . ." (29 U.S.C.A. § 158; emphasis added.) In construing this section the courts have held that the courts have jurisdiction to restore union membership to a member improperly deprived thereof by his union. As said in *Mahoney v. Sailors' Union of the Pacific* (1954), 45 Wn.2d 453 [275 P.2d 440], improper expulsion by the union does not constitute an "unfair labor practice" which under the act takes jurisdiction away from the courts. (See also *Real v. Curran*, 285 App.Div. 552 [138 N.Y.S.2d 809].)

So far as the award of damages is concerned, it was awarded not for an unfair labor practice, but for breach of contract and as incidental to the restoration to plaintiff of his right of membership. The contention that the Labor Relations Board has sole jurisdiction of the question of damages in a case of this kind was made and answered in *Taylor v. Marine Cooks & Stewards Assn.*, 117 Cal.App.2d 556, 564 [256 P.2d 595]: "Appellants argue that these dis-

putes are solely cognizable by the National Labor Relations Board under the Taft-Hartley Act. (29 U.S.C.A. § 158 (b) 2.) The damages suffered by respondents were an incident of the wrongful act of appellant union in taking disciplinary [fol. 170] action against them in a manner which was violative of their rights under the constitution of the union. Nowhere in the Taft-Hartley Act is the N.L.R.B. given jurisdiction or authority to review the legality of any disciplinary action taken by a union against one of its members or to order a member's reinstatement in the union or to award damages resulting from his wrongful expulsion. These powers are left in the courts of law where they have always resided. We find nothing in the Taft-Hartley Act to deprive a court of the power to do complete justice between a wrongfully disciplined member and his union by allowing such damages as he may have suffered as an incident to the judgment restoring him to the rights within the union of which he had been illegally deprived."

There are many cases holding it to be an unfair labor practice for a union in any way to cause an employer to fail to employ an expelled member (whether the expulsion be proper or improper), and that the National Labor Relations Act authorizes the Labor Relations Board to compensate the member for loss of earnings if lost through the procedures followed by the union whereby employers were caused to discriminate against such members. (*Real v. Curran, supra*, 138 N.Y.S.2d 809.)¹⁰ But in all those cases [fol. 171] the charge was made that the acts of the union constituted unfair labor practices and such charge was an issue in each case. As we have pointed out it was not an issue here. In *Weber v. Anheuser-Busch, Inc., supra*, 348 U.S. 468, where the issue was whether the unions were guilty of unfair labor practices the court must have had this very distinction in mind for after referring to the

¹⁰ Among other cases are: *Born v. Laube*, 213 F.2d 407, cert. den. Oct. 18, 1954, 348 U.S. 855 [75 S.Ct. 80, 99 L.Ed. 674]; *Radio Officers v. National Labor Relations Board*, 347 U.S. 17 [74 S.Ct. 323, 98 L.Ed. 455]; *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468 [75 S.Ct. 480, 99 L.Ed. 546]; *Mahoney v. Sailors Union of the Pacific, supra*, 275 P.2d 440; *Sterling v. Local 438, etc. Assn.* (1955), 207 Md. 132 [132 A.2d 389].

"delicate problem of the interplay between state and federal jurisdiction touching labor relations" (p. 474) and after stating (p. 480) "the Labor Management Relations Act 'leaves much to the states, though Congress has refrained from telling us how much'" (quoting from *Garner v. Teamsters etc. Union*, 346 U.S. 485, 488 [74 S.Ct. 161, 98 L.Ed. 228]) it prefaced its conclusion that the state court did not have jurisdiction of the unfair labor practices charged, as follows: " * * * where the moving party itself alleges unfair labor practices * * * " (P. 481; emphasis added.) In *United Const. Workers v. Laburnum Const. Corp.*, 347 U.S. 656 [74 S.Ct. 833, 98 L.Ed. 1025], the court held that the National Labor Relations Act did not give such exclusive jurisdiction to the National Labor Relations Board as to deprive a Virginia state court of jurisdiction to try a common law tort action brought by a construction company against a union even though the United States Supreme Court assumed the conduct constituted an unfair labor practice under the act.¹¹

[fol.172] In *Real v. Curran*, *supra*, 138 N.Y.S.2d 809, where a member allegedly was illegally expelled from his union, the court held that the Labor Relations Board could only act where there was an unfair labor practice, that improperly expelling the member did not constitute such practice and hence the board had no power to restore his union membership. Therefore it held that there was nothing in the Labor Relations Act which would affect the law which had long existed in New York that a wrongfully expelled member of a labor union was entitled to restoration by the state courts to union membership and "in a proper case, damages for consequent loss of wages." (P. 811.) "It is, therefore, concluded that the provisions of the Labor Management Relations Act, 1947, do not exclude the State courts from their traditional jurisdiction to restore to membership a wrongfully expelled member of the union." (P. 814.)

In *International Union, etc. C.I.O. & Local 660 v. Hinz*, 218 F.2d 664 (U. S. Ct. of Appeals, 6th Cir., 1955), the plaintiff sued the union in the state court of Michigan for

¹¹ It is significant that there, as here, the trial court made no finding that the acts in question did constitute unfair labor practices.

damages (not for reinstatement in the union) charging that his union membership had been wrongfully terminated, and asking both compensatory and exemplary damages for loss of wages, etc. The union filed a complaint in the U. S. District Court praying for an injunction against the prosecution of said suit in the state court. In upholding the action of the District Court in dismissing this complaint, the reviewing court held: "Appellee's work did not cease as a consequence of a current labor dispute nor be- [fol. 173] cause of an unfair labor practice." (P. 665.) "The Board has no jurisdiction in disputes between a union and its members nor authority over the internal operation of a union." (P. 665.) See also *Amalgamated Clothing Workers of America v. Richmond Bros. Co.*, (6 Cir.) 211 F.2d 449, and *International Union of Electrical, Radio & Machine Workers, C.I.O. v. Underwood Corp.*, 219 F.2d 100).

In *Holderby v. International Union of Operating Engrs.*, *supra*, 45 Cal.2d 843, the plaintiff filed an action in which he sought and obtained reinstatement as a member in good standing in the union and damages resulting from his alleged unlawful exclusion therefrom. While the Supreme Court reversed the judgment on the ground of the plaintiff's failure to exhaust his administrative remedy, it is interesting to note that the court nowhere intimates that it did not have jurisdiction of the subject matter of the action. Likewise in *Weber v. Marine Cooks & Stewards Assn.*, 123 Cal.App.2d 328 [266 P.2d 801], the plaintiff sued for reinstatement in his union after an alleged wrongful expulsion and for damages in the loss of wages and for mental suffering (just as plaintiff did here). The trial court granted a motion for nonsuit on the ground of laches alone. The reviewing court reversed the judgment and sent the case back for trial. It evidently had no doubt concerning its jurisdiction.

The language of William J. Isaacson in his article, "Labor Relations Law: Federal versus State Jurisdiction," appearing in the May, 1956, *American Bar Association Journal* (vol. 42, No. 5, p. 415) is applicable here. [fol. 174] After calling attention to the fact that there is a conflict between the courts, both state and federal, which

have considered the question here involved, and that the United States Supreme Court has not passed upon it, and then referring to *Real v. Curran*, *supra*, 138 N.Y.S.2d 809, and *Mahoney v. Sailors' Union of the Pacific*, *supra*, 275 P.2d 440, the article then states (p. 483): "Although even these state court decisions may lead to possible conflict between the federal labor board and state courts they do not present potentialities of conflicts in kind or degree which require a hands off directive to the states. A state court decision requiring restoration of membership requires consideration of and judgment upon matters wholly outside the scope of the National Labor Relations Board's determination with reference to employer discrimination after union ouster from membership. The state court proceedings deal with arbitrariness and misconduct viz-a-vis the individual union members and the union; the Board proceeding, looking principally to the nexus between union action and employer discrimination, examines the ouster from membership in entirely different terms."

Damages: (b) Award.

Appellants contend that there is no evidence to support the award of \$6,800 damages for loss of wages.¹² Petitioner testified that his earnings were nearly always \$100 per week at least, and frequently between that figure and \$200. [fol. 175] At the time of his expulsion from the union he was employed as a marine machinist by the General Electric Company. About four days thereafter he was injured on the job, incapacitated approximately three weeks. The ordinary practice was for employers to telephone the union hall for men, and the union members would be dispatched to the work. Thereafter he applied to the union for an assignment to a job as he had done prior thereto. He was refused dispatch by the union dispatcher. He testified he sought work directly from the employers but without success. Although there was some testimony to the effect that the union might dispatch a nonmember to a job if he had a letter from the employer requesting him, the dispatcher

¹² They apparently do not claim the evidence is insufficient to support the award of \$2,500 for mental distress.

testified that plaintiff would not have been dispatched even if he had such letter. There was ample evidence to support the award.

The judgment is affirmed.

Bray, J.

Peters, P. J., and Wood (Fred B.), J., concurred.

Filed June 12, 1956,
Walter S. Chisholm, Clerk.

[fol. 176] [File endorsement omitted]

DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE FIRST APPELLATE DISTRICT

Division One

MARCOS GONZALES, Petitioner and Respondent,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, ETC., et al.,
Respondents and Appellants.

ORDER DENYING PETITION FOR REHEARING—July 12, 1956

BY THE COURT:

The Petition for a Rehearing filed in the above entitled cause is hereby denied.

[fol. 177] IN THE SUPREME COURT OF THE STATE OF
CALIFORNIA, IN BANK

GONZALES

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, ET AL.

ORDER DENYING HEARING AFTER JUDGMENT BY
DISTRICT COURT OF APPEAL

1st District, Division 1, Civ. No. 16536

Appellants' petition for hearing DENIED.

Carter, J. of the opinion that the petition should be
granted.

GIBSON, Chief Justice.

I, William I. Sullivan, Clerk of the Supreme Court of the
State of California, do hereby certify that the preceding is
a true copy of an order of this Court, as shown by the
records of my office.

Witness my hand and the seal of the Court this 19th day
of October, A.D. 1956, William I. Sullivan, Clerk, By J. M.
Rogers, Deputy Clerk.

(SEAL)

Filed August 8, 1956, William I. Sullivan, Clerk, By
H. M. Gardiser, S. F. Deputy.

[fol. 178]

PETITIONERS' EXHIBIT No. 8

Pacific Coast
Master Agreement
for
Marine Machinist

Between

Pacific Coast
Ship Builders

and

International Association of
Machinists

and

Local Lodges Nos. 63, 68, 79,
238, 239, 297, 364 and 1173

August, 1952

[fol. 179]

Appendix "A"

The following employers were named in Certification of
Representatives in NLRB Case No. 20-RC-1275:

San Francisco, California, Bay Area Port:

Colberg Boat Works

Columbia Machine Works

Fulton Shipyard

DeLano Bros. Co.

Hyet & Struck Engineering Co.

George W. Kneass Company

*Madden & Lewis

Martinolich Ship Repair Co.

*Pacific Ship Repair, Inc.

*Sausalito Shipbuilding Company

*Stephens Brothers, Inc.

*Thomas A. Short Co.

*Thomson Machine Works Co.

Triple A Machine Shop, Inc.

Wagner & Niehaus General Machine Shop

*West Winds, Inc.

Western Engineering

Seattle, Washington, Area Port

- Alaska Steamship Company
- Bellingham Shipyards Co.
- Blanchard Boat Company
- Bryant's Marina, Inc.
- Dowamish Shipyard, Inc.
- *Commercial Ship Repair
- *Fishing Vessel Owners Marine Ways, Inc.
- Foss Launch & Tug Company
- Goddard Marine Electric Company
- [fol. 180] Jensen Motor Boat Company
- *Johnson Manufacturing Company
- *Lake Union Drydock Company
- Northwest Ship Repair Company
- *Pacific Fishermen, Inc.
- *Prothero Boat Company
- *Puget Sound Bridge and Dredging Company
- *Seattle Shipbuilding & Drydocking Corp.
- Shain Manufacturing Company
- *Todd Shipyards Corp. (Seattle Div.)

Portland, Oregon, Area Port

- *Albina Engine & Machine Works, Inc.
- *Gunderson Brothers Engineering Corp.
- *Northwest Marine Iron Works
- *Willamette Iron & Steel Company

Tacoma, Washington, Area Port

- *Birchfield Boiler, Inc.
- Kasulin-Cole Shipbuilding Corp., Inc.
- *J. M. Martinac Shipbuilding Corp.
- J. M. Martinac & Son Shipbuilding Co.
- *Pacific Boat Building Company
- Peterson Boat Building Company
- Puget Sound Boat Building Corp.
- *Tacoma Boat Building Co., Inc.
- *Western Boat Building Company
- *Participated in negotiations through authorized representative.

Wage Schedule

Tool & Die Maker	\$2.50
Machinists (all classifications)	2.13
Helpers	1.83
Leading Men	2.38

[fol. 181]

PETITIONERS' EXHIBIT No. 9

International Association of Machinists

(Emblem)

CONSTITUTION

of the Grand Lodge,
District and Local Lodges,
Councils and Conferences

Revised by the Committee on Law as recommended by the Twenty-Second Convention of the Grand Lodge of The International Association of Machinists, held in the City of Grand Rapids, Michigan, September 13 to 24, 1948, and thereafter adopted by referendum vote in the month of December, 1948, effective April 1, 1949.

Grand Lodge
International Association of Machinists
Machinists Building
Washington 1, D. C.

[fol. 182] CONSTITUTION OF THE GRAND LODGE
 of the
International Association of Machinists

Article I

Grand Lodge—Structure and Powers

Name and Location

Section 1. This organization shall be known by the title and name of "The Grand Lodge of The International Association of Machinists," and its principal office and headquarters shall be permanently located in the city of Washington, D. C.

Membership and Jurisdiction

Sec. 2. The Grand Lodge of the International Association of Machinists shall consist of an Executive Council and the representatives of local lodges who are duly elected, qualified and seated as delegates in the quadrennial and special conventions provided for in Article II of this Constitution. It shall have power to grant charters for the purpose of organizing, supervising, controlling, and generally directing district and local lodges in any State, territory, or dependency of the United States of America and the Dominion of Canada.

Government

Sec. 3. The government and superintendents of all district and local lodges shall be vested in this Grand Lodge as the supreme head of all such lodges under its jurisdiction. To it shall belong the authority to determine the customs and usages in regard to all matters relating to the craft.

[fol. 183] Government Between Conventions

Sec. 4. Between conventions all Executive and Judicial Powers of the Grand Lodge shall be vested in the Executive Council, which shall be composed of the International President, the General Secretary-Treasurer, and nine (9) General Vice Presidents.

Article II

Grand Lodge Conventions

[fol. 184] Parliamentary Laws

Sec. 11. Roberts' Rules of Order shall be the parliamentary law of this Grand Lodge and shall apply to all parliamentary procedure of the Grand Lodge, except in cases otherwise provided for by this Constitution.

[fol. 185] Article XIV.

Benefits

Death Benefits

Section 1. Upon receipt of proof of the death of a member of any local lodge, duly attested by the signatures of the president and financial secretary of said lodge on blanks furnished for that purpose by the General Secretary-Treasurer, to which the seal of the local lodge is affixed, the Grand Lodge shall pay the death benefits based upon the rate of per capita tax paid upon the designated member and the period of his continuous good standing membership in a local lodge or local lodges at the time of his demise.

(a) The death benefit for all members in good standing prior to April 1, 1937 of local lodges upon whose membership the full rate of one dollar (\$1) per month per capita has been paid to the Grand Lodge prior to April 1, 1946, and the full rate of one dollar and five cents (\$1.05) per month per capita after March 31, 1946, and the full rate of one dollar and thirty cents (\$1.30) per month per capita after March 31, 1949, shall be paid upon their period of continuous good standing membership as follows: Three (3) years, fifty dollars (\$50); four (4) years, seventy-five dollars (\$75); five (5) years, one hundred dollars (\$100); six (6) years, one hundred and twenty-five dollars (\$125); seven (7) years, one hundred and fifty dollars (\$150); eight (8) years, one hundred and seventy-five dollars

(\$175); nine (9) years, two hundred dollars (\$200); ten (10) years, two hundred and twenty-five dollars (\$225); eleven (11) years, two hundred and fifty dollars (\$250); twelve (12) years, two hundred and seventy-five dollars (\$275); thirteen (13) years, three hundred dollars (\$300).

The provisions of this section do not change, in any way, the accrued death benefit to which members were entitled under the Constitution as in effect in 1928; but it does operate to extend the time before any increase in such benefits will accrue to members of less than ten years standing.

(b) The death benefit for all members initiated or reinstated after March 31, 1937 upon whose membership the full rate of one dollar (\$1) per month per capita has been paid to the Grand Lodge prior to April 1, 1946, and the full rate of one dollar and five cents (\$1.05) per month per capita after March 31, 1946, and the full rate of one dollar and thirty cents (\$1.30) per month per capita after March 31, 1949, shall be paid upon their period of continuous good standing membership as follows: Three (3) years, fifty dollars (\$50); five (5) years, seventy-five dollars (\$75); seven (7) years, one hundred dollars (\$100); nine (9) years, one hundred and twenty-five dollars (\$125); eleven (11) years, one hundred and fifty dollars (\$150); thirteen (13) years, one hundred and seventy-five dollars (\$175); fifteen (15) years, two hundred dollars (\$200); seventeen (17) years, two hundred and twenty-five dollars (\$225); eighteen (18) years, two hundred and fifty dollars (\$250); nineteen (19) years, two hundred and seventy-five dollars (\$275); twenty (20) years, three hundred dollars (\$300).

(c) The death benefit for apprentices upon whose membership the regular rate of per capita tax only has been paid to the Grand Lodge shall be fifty per cent (50%) of the respective amounts set forth under subdivision (b) of this section.

(d) The death benefit for all machinists' helpers and production workers upon whose membership only sixty-five (65) cents per month per capita tax has been paid to

the Grand Lodge prior to April 1, 1946, and seventy (70) cents per month per capita after March 31, 1946, and ninety-five (95) cents per month per capita after March 31, 1949, shall be sixty-five per cent (65%) of the respective amounts set forth under subdivisions (a) and (b) of this section.

No death benefits shall be paid upon the death of any member who was fifty (50) years of age, or over, at the date of his initiation, or at the date of his last reinstatement as a member of a local lodge of the International Association of Machinists. (This provision does not apply to a person who was initiated, or reinstated in a local lodge prior to January 1, 1917, and who has remained in continuous good standing to the date of his death.)

The term "continuous good standing" as used in this Article designates members of local lodges who are credited and reported to the Grand Lodge as receiving regular monthly due stamps. Members receiving unemployment stamps or retirement stamps, provided for in Article XXII and Article XXIII of this Constitution are not entitled to accumulated benefits covering the months for which said stamps are accepted.

All unpaid "Labor" subscriptions shall be deducted from benefits due.

[fol. 186]

Sick Benefits

Sec. 4. No sick benefits are paid by the Grand Lodge, but any local lodge of the International Association of Machinists may provide in its by-laws for the payment of sick benefits to its members, subject, however, to the approval of the provisions therefor by the International President.

[fol. 187]

Article XIX

Government and Control of Local Lodges

Provisions for Constitution

Section 1. The Grand Lodge shall provide a constitution for the government and control of local lodges, and all local lodges organized and affiliated in the Grand Lodge of the International Association of Machinists shall be governed

and controlled thereby. The Constitution for Local Lodges may be amended in the same manner as provided herein for the amendment of the Grand Lodge Constitution and by no other method whatsoever.

By-Laws

Sec. 2. Each local lodge may adopt its own by-laws, provided that nothing is contained therein which is contrary to the provisions of the Grand Lodge Constitution or the Constitution for Local Lodges. The proposed by-laws of all local lodges, and any amendments thereafter proposed, shall be submitted to the International President for examination, correction, and approval before adoption.

[fol. 189] CONSTITUTION FOR LOCAL LODGES
of the
International Association of Machinists

[fol. 190] Article G
Government of Local Lodges
By-Laws

Section 1. Each local lodge may adopt its own by-laws, provided that nothing is contained therein which is contrary to the provisions of the Grand Lodge Constitution or the Constitution for Local Lodges of the International Association of Machinists. The proposed by-laws of all local lodges and all amendments thereafter proposed, except as to time and place of meeting, shall be submitted to the International President for examination, correction, and approval before being adopted.

Parliamentary Laws

Sec. 2. The Rules of Order governing parliamentary procedure shall be printed in the copies of the Constitution of the Grand Lodge, and no other rules shall apply.

[fol. 191]

Article K

Code

Charges

Section. 1. It is the duty of any member who has information of the violation of any provisions of the Constitution of the Grand Lodge or the Constitution of Local Lodges, by any member or members, to immediately prefer charges in writing against such member or members by filing same with the president of the local lodge to which the accused member or members belong, who shall supply a copy of the same to the member against whom the [fol. 192] charges are preferred and turn over the original charges to the committee provided for by the following Section: (In the event the president, or the president and other officers of the lodge are involved in the charges filed, the next ranking officer shall proceed as herein set forth. In the application of this Section the order of rank of officers shall be president, vice president and past president. In the event the president, vice president and past president are involved in the charges, or are absent, the recording secretary shall call for nominations of a temporary chairman and the members present shall immediately proceed to select a temporary chairman by majority vote. The temporary chairman selected shall then proceed to carry out the requirements of this Section.)

Appointment of Trial Committee

Sec. 2. Whenever charges have been preferred against a member of a local lodge the president of such lodge shall immediately appoint a committee to investigate the charges, take testimony, and decide upon the guilt or innocence of the one accused. The committee so appointed shall within one week thereafter notify the member against whom the charges have been preferred as to the time and place, when and where, to appear for trial. (In the event the president, or the president and other officers of the lodge are involved in the charges filed, the next ranking officer shall proceed as herein set forth. In the application of this Section the order of rank of officers shall be president, vice president

and past president. In the event the president, vice president and past president are involved in the charges, or are absent, the recording secretary shall call for nominations of a temporary chairman and the members present shall immediately proceed to select a temporary chairman by majority vote. The temporary chairman selected shall then proceed to carry out the requirements of this Section.)

Evidence

Sec. 3. The accused shall have the privilege, either in person or by attorney (the attorney being a member of the local lodge) to cross-examine all witnesses appearing [fol. 193] for the prosecution and present all such evidence as he may deem proper in his own behalf. The committee shall consider all of the evidence in the case and thereafter agree upon its verdict of guilty or not guilty. If the verdict be that of guilty the committee shall then consider and agree upon its recommendation of punishment.

[fol. 194] Report of Trial Committee

Sec. 6. The trial committee shall report at the next regular meeting of the local lodge. Such report shall be in two parts as follows:

First: The report shall contain the findings and verdict of the trial committee together with a synopsis of the evidence and testimony presented by both sides.

After the trial committee has made necessary explanation of its intent and meaning, the trial committee's verdict with respect to guilt or innocence of the defendant, shall be submitted without debate to a vote by secret ballot of the members of the local lodge.

Second: If the lodge concurs with a "guilty" verdict of the trial committee, the recommendation of the committee as to the penalty to be imposed shall be submitted in a separate report to the lodge and voted on by secret ballot of the members then in attendance.

Voting on Report

Sec. 7. The recommendation of the committee may be amended, rejected, or another punishment substituted therefor, by a majority vote of those voting on the question, excepting that it shall require a two-thirds ($2/3$) vote of those voting to expel the defendant from membership.

If the lodge reverses a "not guilty" verdict of the trial committee, the punishment to be imposed shall be decided by the lodge by a majority vote of those voting on the [fol. 195] question, except that it shall require a two-thirds ($2/3$) vote of those voting to expel the defendant from membership.

Limit of Fines

Sec. 8. No fine shall be imposed upon any member or applicant eligible to membership in this Association in excess of fifty dollars (\$50.00) unless the same is first approved by the Executive Council.

Appeals

Sec. 9. Appeals may be taken from the decision of any local lodge or Grand Lodge Officer to the International President, provided, however, that such appeals must be taken within thirty (30) days after the decision. Thereafter appeals may be prosecuted in accordance with the provisions of Section 6, Article XXV of the Grand Lodge Constitution.

Rights of Members and Lodges During Appeal

Sec. 10. While any member or local lodge is exercising the right of appeal the financial standing of such member or local lodge shall not be impaired by refusal to accept dues or per capita tax until after the Executive Council has passed upon the appeal. Should any member or local lodge decide to appeal from the decision of the Executive Council they must comply with the provisions of Section 6, Article XXV of the Grand Lodge Constitution. No individual member or local lodge shall appeal to the civil courts for redress until after having exhausted all rights

[fol. 196]

102

ARTICLE K

1 of appeal under the provisions of this Constitution and
2 the Constitution of the Grand Lodge.

W. H. Wayne

Chairman.

Lloyd Weber

Secretary.

Frederick E. Brown

A. G. Smith

W. H. Gorman

COMMITTEE ON LAW, 1949

H. W. Brown

International President.

Attest:

Eric Peterson

General Secretary-Treasurer.

[fol. 197] IN THE DISTRICT COURT OF APPEAL OF THE STATE
OF CALIFORNIA IN AND FOR THE FIRST APPELLATE DISTRICT

DIVISION ONE

ORDER AFFIRMING JUDGMENT

San Francisco, Tuesday, July 12, 1956.

16536—Gonzales v. International Association of Machinists.

The judgment is affirmed. Bray, J. We concur: Peters,
P.J., Fred B. Wood, J.

[fol. 198] CLERK'S CERTIFICATE (omitted in printing).

[fol. 199] SUPREME COURT OF THE UNITED STATES

No. 539, October Term, 1956

INTERNATIONAL ASSOCIATION OF MACHINISTS, an Unincorporated Association; CHARLES TRUAX, Individually, etc.,
et al., Petitioners,

v.

MARCOS GONZALES

ORDER ALLOWING CERTIORARI—January 14, 1957

The petition herein for a writ of certiorari to the District Court of Appeal of the State of California, First Appellate District, is granted and case assigned for argument immediately following No. 427. The Solicitor General is invited to file a brief expressing the views of the National Labor Relations Board.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

breach of contract in the state courts can be asserted. Heretofore, it was demonstrated that the record in this matter—the pleadings, judgment, findings of fact and conclusions of law, the opinion of the trial court as well as the first opinion of the California District Court of Appeal filed February 16, 1956—unequivocally established that the damages for loss of wages were for asserted acts violating Sections 8(b)(1)(A) and 8(b)(2) of the Labor-Management Relations Act, 1947. Consequently, Petitioners submit that it is a gratuitous assumption unsupported by the record to conclude that the damages awarded in this case were . . . *“damages as he may have suffered as an incident to the judgment restoring him to the rights within the union of which he had been illegally deprived”*.

(e) Petitioners further contend that there is no merit in the Court's suggestion that the moving party in the trial court must allege an unfair labor practice by name in order to permit the Respondent in the case to raise the federal question. If this were true, the moving party could choose his forum by failing to characterize specifically the acts charged as federal unfair labor practices.

(f) The partial sentence from *Real v. Curran*, 138 NYS 2d, 809, 811, mentioned in the opinion filed June 12, 1956 (Appendix D, page 36a), when read in its entirety, is diametrically opposed to the conclusion reached by the California Court, and in fact clearly indicates that federal legislation has pre-empted state jurisdiction with respect to an award of compensation for loss of wages arising from asserted acts constituting unfair labor practices.

OCT 31 1956

JOHN T. FEY, Clerk

No. ~~329~~ 31

IN THE
Supreme Court of the United States

OCTOBER TERM, 1956

INTERNATIONAL ASSOCIATION OF MACHINISTS, an unincorporated association; CHARLES TRUAX, individually and as International Representative thereof; THOMAS E. McSHANE, and A. C. McGRAW, as International Representatives thereof; INTERNATIONAL ASSOCIATION OF MACHINISTS, LOCAL LODGE No. 68, an unincorporated association; ROBERT ROLLER, as President of said Local Lodge; REESE CONTE, as Secretary of said Local Lodge; EDWARD PECK, as Treasurer of said Local Lodge; FIRST DOE, SECOND DOE, THIRD DOE, FOURTH DOE and FIFTH DOE, *Petitioners*,

v.

MARCOS GONZALES, *Respondent*.

**PETITION FOR WRIT OF CERTIORARI TO THE
CALIFORNIA DISTRICT COURT OF APPEAL**

PLATO E. PAPPS, *Chief Counsel*
International Association
of Machinists
1300 Connecticut Avenue, N.W.
Washington 6, D. C.

EUGENE K. KENNEDY
733 Middlefield Road
Redwood City, California

CONCLUSION

For the reasons stated, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

PLATO E. PAPPS, *Chief Counsel*
International Association
of Machinists
1300 Connecticut Avenue, N.W.
Washington 6, D. C.

EUGENE K. KENNEDY
733 Middlefield Road
Redwood City, California

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United Construction Workers v. Laburnum, 347 U.S. 656	7, 10
Weber v. Anheuser-Busch, 348 U.S. 468	7, 10

IN THE
Supreme Court of the United States

OCTOBER TERM, 1956

INTERNATIONAL ASSOCIATION OF MACHINISTS, an unincorporated association; CHARLES TRUAX, individually and as International Representative thereof; THOMAS E. McSHANE, and A. C. McGRAW, as International Representatives thereof; INTERNATIONAL ASSOCIATION OF MACHINISTS, LOCAL LODGE No. 68, an unincorporated association; ROBERT ROLLER, as President of said Local Lodge; REESE CONTE, as Secretary of said Local Lodge; EDWARD PECK, as Treasurer of said Local Lodge; FIRST DOE, SECOND DOE, THIRD DOE, FOURTH DOE and FIFTH DOE, *Petitioners*,

v.

MARCOS GONZALES, *Respondent*.

**PETITION FOR WRIT OF CERTIORARI TO THE
CALIFORNIA DISTRICT COURT OF APPEAL**

Petitioners pray that a Writ of Certiorari issue to review the judgment of the District Court of Appeal, State of California, First Appellate District, Division One, entered on June 12, 1956.

CITATIONS AND OPINIONS BELOW

The memorandum opinion of the Superior Court of California, in and for the City and County of San Francisco, a court of general jurisdiction, dated June 7, 1954, is unreported and is printed in Appendix "A" *infra* page 1a.

The judgment of the Superior Court dated July 29, 1954, is printed in Appendix "B" *infra* page 7a.

The opinion of the District Court of Appeal, State of California, dated February 16, 1956, printed in Appendix "C" *infra* page 9a is unreported but may be found in 139 ACA 2d 262.

The opinion of the District Court of Appeal, State of California, dated June 12, 1956, printed in Appendix "D" *infra* page 9a is reported at 142 ACA 2d 227.

JURISDICTION

The judgment of the District Court of Appeal, State of California, was entered on June 12, 1956. Appendix "B", page 7a, *infra*. A timely Petition for Hearing was filed in the California Supreme Court and denied on August 8, 1956. The Federal questions below were timely raised and preserved. The opinions of the California District Court of Appeal reflect a consideration of these questions. Appendices C and D *infra*.

The statutory provisions involved are included in the Labor-Management Relations Act, 1947 (61 Stat. 136; 29 U.S.C. (Supp. I), Sec. 141 *et seq.*), and the jurisdiction of this Court is invoked under 28 USC 1257 (3) on the grounds that Petitioners have been denied their rights, privileges and immunities as

provided in the Labor-Management Relations Act, 1947.

QUESTIONS PRESENTED

The primary question presented is whether a state tribunal has jurisdiction to award compensation for loss of earnings against a union in favor of an employee for asserted acts by the union which constitute unfair labor practices under Sections 8(b)(1) and 8(b)(2) of the Labor-Management Relations Act, hereinafter sometimes designated as the Act.

There is also a subsidiary question challenging the jurisdiction of a state court to award any damages resulting from an unfair labor practice under Sections 8(b)(1) and 8(b)(2) of the Act.

STATEMENT OF THE CASE

Marcos Gonzales, herein called Respondent, refused to comply with a penalty imposed by the Executive Council of the International Association of Machinists. On his refusal to so comply, he was separated from the Union. Respondent then brought an action in the state court for reinstatement in the union, as well as an action for damages for loss of wages. Subsequently, Respondent amended his complaint to claim damages for mental suffering. The award for mental suffering was based at least in part if not entirely on the union's refusal to refer Respondent for work under the provisions of a union referral procedure, and Petitioners were also ordered to reinstate Respondent in the union. Petitioners are not here raising any question as to the correctness of the order of reinstatement, but are addressing this Petition to the question of the state court's jurisdiction to award

compensation for loss of earnings and damages arising from an unfair labor practice. The judgment awarded \$6,800.00 for loss of wages, and \$2,500.00 for grievous physical and mental pain and suffering, humiliation, anxiety and degradation. (Appendix B, *infra*).

In their original answer Petitioners alleged that Respondent had an adequate remedy at law under Sections 8(b)(1) and 8(b)(2) of the National Labor Relations Act, as amended. (Appendix F, *infra*). On leave granted by the California District Court of Appeal, a supplemental brief was filed by Petitioners, dated July 12, 1955, contending that the National Labor Relations Board was the sole forum to make a determination of entitlement to compensation and damages in a type of case presented by this record.

In its decision filed February 16, 1956, the California District Court of Appeal, while upholding Respondent's order of reinstatement in the union, reversed the award of damages in the trial court on the ground that that determination was solely for the National Labor Relations Board.

Thereafter, following a petition for rehearing by Respondent, the California District Court of Appeal on June 12, 1956, reversed its decision of February 16, 1956, and decided that Respondent should be awarded damages.

The record shows that the award of \$6,800.00 for loss of wages was based on Petitioners' asserted denial to Respondent of the use of the union hiring procedures. Respondent's petition for a writ of mandate alleges that his loss of employment was "solely by reason of"

his illegal expulsion by the Union. (Clks. Tr. 9, App. E. *infra*).

It is undisputed that the Employers with whom the Union had a union referral arrangement are in interstate commerce within the meaning of Section 2(7) of the Act. In fact the Union is the certified bargaining representative for the employees of these Employers.¹

It should be here noted that prior to the filing of the complaint in this cause Respondent Gonzales filed with the National Labor Relations Board unfair labor practice charges alleging that the Petitioners had committed unfair labor practices. These charges were voluntarily withdrawn by the Respondent and he then commenced this proceeding. (R. Tr. 47; 48; 51). It should be here noted that under the unfair labor practice provisions involving Section 8(b) of the Act, an employer is not a necessary party to an unfair labor practice proceeding.

¹ The record demonstrates and it is implicit in the two decisions of the District Court of Appeal and the briefs and petitions of Respondent's counsel that this is a matter for federal jurisdiction under the power to regulate interstate commerce. Testimony of Respondent indicates that following his separation from the union, he was refused work at Columbia Machine Company, Triple A Machine Shop and Wagner-Niehaus and that he also failed to obtain work at Matson Navigation Company (Rep. Tr. 36).

Petitioner's Exhibit 9 (trial court designation) on page 29 (Appendix I herein), reflects that in N.L.R.B. Case No. 20-RC-1275, Columbia Machine Works, Triple A Machine Shop and Wagner-Niehaus were included in the bargaining unit certified by the National Labor Relations Board. Also included in this unit was Pacific Ship Repair, Inc., where Respondent testified he last worked in February 1952 (Rep. Tr. 33). There is also included in the record that Respondent's work was primarily on ocean-going vessels and that at some times he was employed by the General Electric Company (Rep. Tr. 6, 33).

Referring to Respondent's suspension from membership, the opinion of the trial court states that:

"Petitioner [Respondent] was by virtue of said action, prevented from working as a machinist and thereby sustained loss of wages. The petitioner was out of work from March 4, 1952, to June 26, 1953, when he became incapacitated because of illness. We have assessed the damages for said period to be in the sum of \$6,800.00 at the rate of \$100.00 per week, which as testified by petitioner, was the lowest weekly wage received by him during the years 1950, 1951 and 1952". Clks. Tr. 41, Appendix "A", page 1a *infra*).

It also appears from the Findings of Fact and Conclusions of Law (Clks. Tr. 49, Appendix G, page 40a *infra*; Clks. Tr. 52, Appendix H, page 40a *infra*) that the award of damages was because Petitioners caused Respondent to lose employment by reason of his separation from the union.

Further, the judgment of the trial court (Appendix B, page 7a *infra*) recites that \$6,800.00 was awarded for loss of wages. Since the wage loss was determined to have been caused by Petitioners, such wage loss was caused by asserted acts in violation of Sections 7, 8(b)(1)(A) and 8(b)(2) of the Act (Appendix J).

The decision of the California District Court of Appeal of February 16, 1956, stated:

"Because the withholding from petitioner [Respondent] of the required card to obtain employment and the refusal of the union dispatcher to send petitioner out on a job constituted unfair labor practices, and consequently, the exclusive jurisdiction of the damages issue is in the Labor Relations Board, we are forced to hold that the award of damages by the trial court was beyond

the jurisdiction of the trial court and must be reversed." (Emphasis ours) (Appendix C, page 21a *infra*).

In its decision of June 12, 1956, reversing its judgment on damages, the California District Court of Appeal in the opinion of Petitioners based its decision on assumptions without merit, some of which Petitioners will indicate under the Reasons for Granting Certiorari.

Petitioners have failed to obtain a judicial expression at any stage of this case concerning the significance of Respondent's Exhibit "E" (trial court designation) which indicates that as far as Petitioners were concerned, Respondent was out of work, except for one month, in the years 1950, 1951 and 1952. This Exhibit is a concededly authentic union record, and since the trial court awarded damages of \$100.00 per week starting in March of 1952, on the strength of Respondent's testimony that his lowest weekly wage received by him during the years 1950, 1951 and 1952 was \$100.00 per week, it was Petitioners' contention that the award of damages was not supported by the record in this matter. (Rep. Tr. 33). (Rep. Tr. 116, 117)

REASONS FOR GRANTING THE PETITION

(1) This Court has decided that an unfair labor practice within the meaning of the Act is solely for the determination of the National Labor Relations Board in the first instance if there is a remedy and if non-violent conduct is involved. *Garner v. Teamsters Union*, 346 U.S. 485; *Weber v. Anheuser-Busch*, 348 U.S. 468; *United Construction Workers v. Laburnum*, 347 U.S. 656.

Inasmuch as the record facts before the court indicate that damages were awarded for asserted acts constituting a violation of 8(b)(2) and 8(b)(1)(A) of the Act, it follows that the judgment of the California Court is in conflict with the foregoing decisions of this Court. This follows because the complete remedies of the Act were available to Respondent and the asserted acts involve non-violent conduct. *Radio Officers v. N.L.R.B.*, 347 U.S. 17.

(2) With respect to the narrower question of loss of wages flowing from a violation of 8(b)(2) and 8(b)(1) of the Act, the case at bar is squarely in conflict with the following decisions:

Born v. Laube, 213 F. 2d 407, 214 F. 2d 349, cert. den. October 18, 1954, 348 U.S. 855.

Sterling v. Local 438, 207 Md. 132, 111A 2d, 389, cert. den. October 24, 1955, 350 U.S. 875.

Mahoney v. Sailors Union of the Pacific, 45 Wn. 2d 453, 275 P. 2d 440, cert. den. April 25, 1955, 349 U.S. 915.

Real v. Curran, 138 N.Y.S. 2d, 809.

The above cases hold that jurisdiction to award damages for wage loss in the type of case at bar is solely for federal determination. *Contra: Taylor v. Marine Cooks & Stewards*, 177 Cal. App. 2d 556.²

(3) Concerning the award for mental anxiety connected with wage loss (Rep. Tr. 132, 134, 142, 143), the case at bar conflicts in principle with *Born v. Laube* and *Sterling v. Local supra*, wherein the aggrieved union members were awarded damages for

² This case was decided prior to this Court's Opinion in *Garner v. Teamsters Union*, 146 U.S. 485, without mention of cases, statutes or constitutional provisions, and merely stated that the Taft-Hartley Law did not divest the California Court of jurisdiction in the *Taylor* case.

loss of wages and also exemplary damages for upon actions constituting unfair labor practices. Both appellate decisions held that merely because the state remedy went beyond the federal remedy afforded by the Act, the remedy sought was a question for consideration by the National Labor Relations Board in the first instance, and the judgment awarding damages for loss of wages as well as exemplary damages was reversed. Petitioners submit that in the context of the questions here presented, an award for mental anxiety in connection with an award for wage loss arising from the unfair labor practices is no different in principle from an award of exemplary damages in connection with wage loss. On this question, the Ninth Circuit Court of Appeals in the *Born* opinion (213 F. 2d 407) *supra* at page 410 quoted a statement of this Court made by the late Justice Holmes in *Charleston & Western Carolina Railway Co. v. Varnville Furniture Company*, 237 U.S. 597, 604:

“When Congress” he said “has taken the particular subject matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go”.

As an original matter it appears that if a party aggrieved by an unfair labor practice can obtain damages in state tribunals for mental anxiety caused by such unfair labor practice, Congress would have so provided in the Act. This it did not do.³ *Born v.*

³ Section 10(a) provides in part: The Board is empowered as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise. . . .

Laube, 213 F. 2d 407, 214 F. 2d 349, cert. den. October 18, 1954, 348 U.S. 855; *Sterling v. Local 438*, 207 Md. 132, 111A 2d 389, cert. den. October 24, 1955, 350 U.S. 875.

(4) The questions raised by this case potentially affect the rights of all union members, employees, labor unions, and employers. If it is accepted that an employee can sue a union in a state court for loss of wages caused by a federal unfair labor practice, it follows that he could also sue an employer in a state court for wage loss caused by an employer's federal unfair labor practice. It was this precise problem that Congress dealt with when it enacted the National Labor Relations Act and its successor, and the exclusive remedial powers which it entrusted to the National Labor Relations Board. (*Garner v. Teamsters Union*, 346 U.S. 485; *Weber v. Anheuser-Busch*, 348 U.S. 468; *United Construction Workers v. Laburnum*, 347 U.S. 656).

(5) The following comments are intended to correct what Petitioners believe to be conclusions without merit in the decision of the California District Court of Appeal, dated June 12, 1956, Appendix "D", commencing on page . . .

(a) Petitioners submit that the complaint in the trial court did not allege a breach of contract as set forth in the opinion, but, to the contrary, alleged that Respondent "has been unable to secure employment in his former occupation solely by reason of the illegal, wrongful and improper expulsion . . ." (Clks. Tr. 9).

Petitioners' answer in the trial court by way of defense alleged that Respondent had an adequate

remedy under the provisions of Section 8(b)(1) and 8(b)(2) of the Act. (Clks. Tr. 26). (Appendix F *infra*, page 39a). Petitioners do not claim this alone raised the federal question but rather cite this to disprove the statement of the California court that the answer said nothing about unfair labor practices.

(b) The court's opinion states that because of Respondent's loss of membership, he was damaged, but Petitioners in view of the foregoing submit that there is no support for the Court's statements that the "damage was not charged nor treated as a result of an unfair labor practice" and that "the question of an unfair labor practice was not raised." In fact, the California District Court of Appeal found these Acts to be unfair labor practices in its decision filed February 16, 1956 (Appendix C, *infra*).

(c) With reference to the statement in the opinion that the original complaint did not characterize asserted acts of Petitioners as unfair labor practices it is true. But it is submitted that this finding is of no significance because Petitioners certainly had no control as to the content of the Respondent's original pleading. Moreover, since Petitioners' position was that they had not caused Respondent's unemployment, it follows that they would not charge themselves with unfair labor practices. Petitioners could only be expected to say, as they did, that the existence of an unfair labor practice, if any, should be determined by the National Labor Relations Board in the first instance.

(d) The decision of June 12, 1956, appears to state that if acts are both federal unfair labor practices and a breach of contract, the state remedy for a

Filed in Open Court June 7, 1954
Martin Mongan, Clerk
By C. Wall, Deputy Clerk

APPENDIX "A"

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND
FOR THE CITY AND COUNTY OF SAN FRANCISCO

No. 423147

MARCOS GONZALES, *Petitioner,*

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, *et al.,*
Respondents.

Memorandum of Decision

This Court has made its order that a Writ of Mandate directing and compelling respondents to restore to petitioner all of his rights and privileges in respondent associations and to reinstate petitioner as a member in good standing thereof without payment of any fine or the statement of any apology to the Respondent Truax or to any other person, and has ordered judgment for damages, upon the ground and for the reason that petitioner was deprived of his said rights, duties and membership in an illegal manner.

In arriving at its decision this Court is not unmindful of the following general propositions of law which are applicable to labor unions and associations, to-wit: That the Charter of a subordinate lodge and the constitution and by-laws of the parent organization constitute the contract between the lodge and the parent organization; that the subordinate lodge constitution and by-laws constitute a contract between the lodge and its members; that the rights and duties of members, the conditions of membership, and the gaining and losing of membership are limited and must be measured by the terms of the contract; and that a member of associations of this type must first exhaust the rights afforded him by the tribunals of the

association before he may seek redress from the courts. (Smitherham v. Laundry Workers Union, 44 CA (2d) 131; Bush v. International Alliance, 55 CA (2d) 457; McConville v. Milk Union, 106 Cal. App. 696).

It is likewise settled law, however, that once a person has acquired the personal right of membership under such a contract he cannot be deprived of it except upon a strict observance of the proceedings prescribed for its termination in the constitution or by-laws of the association of which he is a member; and that where such an association has violated its own laws and regulations and has arbitrarily violated a members property rights the member need not exhaust his remedies within the organization before resort is had to the courts. (Dinguvall v. Amalgamated Association, 4 CA 565; Weber v. Marine Cooks, 93 CA (2d) 327; Harris v. National Union, 98 CA (2d) 733; Cason v. Glass Bottle Blowers, 37 Cal. (2d) 134).

Aside from the question as to whether or not Article XXV, Section 1, of the Grand Lodge Constitution was effective at the time the petitioner made the allegedly false and malicious statements reflecting upon the private and/or public conduct of respondent Truax, it appearing that the said statements were contained in a complaint for damages for assault and battery filed in the Superior Court of the City and County of San Francisco, filed on March 9, 1949, and it further appearing that said Article XXV, Section 1, became effective April 1, 1949, (upon a revision of a previous Constitution which may have contained similar provisions) we are of the opinion that there was sufficient evidence before the association to support the conclusion of the Trial Committee that the petitioner had violated said provisions particularly in view of the fact that petitioner admitted before the Trial Committee, on July 7, 1950, that he had no proof or evidence that Truax had assaulted him or that he instructed or advised anyone else to do it. Conceding for the purposes of this decision that there was such a Constitutional provision in

effect at the time petitioner allegedly violated it, we are constrained—it not being the province of this Court to consider the weight of such evidence or to substitute our judgment thereon for that of Trial Committee before whom petitioner was tried—to hold that there was evidence to support its conclusion that petitioner was guilty of such violation.

The illegality of the proceedings appears after the Trial Committee submitted its report to the membership of the Lodge. Article K of the Constitution for the Local Lodge specifically and in great detail sets forth the trial procedure and the voting upon said report. In Section 6 of Article K it is specifically provided that the “trial committee shall report at the next regular meeting”, and the Trial Committee did so in this case. That article clearly indicates that the Trial Committee’s recommendations are to be voted upon at this meeting. That procedure was followed in this case and the membership by secret ballot rejected the recommendation of the Trial Committee and in effect rendered a “Not Guilty” verdict. Thereafter, at the next meeting on August 2, 1950, and without any previous notice therefor, the membership rescinded its action of the previous meeting and concurred in the “guilty verdict” of the trial committee voted to expel petitioner. The only authority for this subsequent action is to be found in Rule 27 of Rules of Order of the Constitution for Local Lodges which provides: “All questions, *unless otherwise provided*, shall be decided in accordance with Robert’s Rules of Order,” (emphasis ours). It is our opinion that this action taken on August 2, 1950, is illegal. Although Roberts Rules of Order provide for the rescission of some action previously taken, they cannot, as said in *Harris v. National Union, etc.*, 98 CA (2) 733, “change the plain requirement of the constitution nor convert by procedural slight of hand” the procedure which the constitution requires. Petitioner was acquitted under the specific provisions of Article K, the procedural provisions of

which, cannot be avoided by resort to Robert's Rules of Order. We are also of the opinion that even if it be conceded that the action of Aug. 2, 1950, was proper that the penalty of expulsion was illegal. Section 7 of Article K requires "a $\frac{2}{3}$ vote of those voting to expel the defendant from membership" (emphasis ours). The vote was 29 yes, 14 noes and 1 blank. Forty-four persons voted on the question of the Trial Committee's recommendation of expulsion. A $\frac{2}{3}$ vote required 30 to vote for expulsion. Merely because one person declined to vote either for or against expulsion is no indication that he was not voting. It may be reasoned that by declining to vote either for or against expulsion he was exercising his right to indicate that he was in favor of some form of punishment other than that recommended by the committee as contemplated in Section 7 of Article K.

Although petitioner could then have sought redress to the courts, he chose to appeal to the International President as provided by the Grand Lodge Constitution. The International President should have reversed the decision of August 2, 1950; on the grounds that the same was illegal. Instead he affirmed the finding of "guilty" but modified the penalty to a \$500.00 fine and an apology. In this regard it should be pointed out that the only penalty provided for the offense herein charged is "fine or expulsion, or both" (Article XXV Section 1 of Grand Lodge Constitution). There is no penalty providing for an apology nor is there any fine authorized in excess of \$50.00. (Section 8 of Article K). Nowhere do we find any provision empowering the International President to impose a penalty other than expulsion or "fine in excess of \$50.00", unless the same is *first* approved by the Executive Council, which approval was not had in this case. It must be noted also that the International President regarded the action of Aug. 2, 1950, as a "reconsideration" of the action taken on July 19, 1950, rather than a motion "to rescind." (See Plaintiff's Exhibit No. 5). Conceding for sake of argu-

ment, that reconsideration of the action taken on July 19, 1950, would have been proper, such action should have been taken on July 19, 1950, and not on Aug. 2, 1950. Rules 24 and 25 of the Rules of Order of the Constitution for Local Lodges provide, respectively, as follows: "When a question has been decided it can be reconsidered by a majority vote of those present . . . A motion to reconsider must be made and seconded by two members who voted with the majority." It does not appear that this procedure was followed either on July 19th or on August 2nd.

The fact that in his decision and International President stated "that his decision would have been exactly the same regardless of the fact that the Lodge at its meeting on Aug. 2, 1950, reversed the decision made on July 19" does not alter the situation. This statement is apparently with reference to the appeal respondent Truax had taken on July 28, 1950, with reference to the action taken on July 19, 1950, which appeal Truax withdrew on Aug. 22, 1950, after the action taken on August 2, 1950, and after Petitioner's appeal filed on Aug. 15, 1950. The International President was not considering Truax's appeal, but that of Petitioner, which not only encompassed the findings of the Trial Committee but all the procedures of July 19 and Aug. 2, as well. Although the International President agreed with the findings of the Trial Committee and found that the same were based on substantial evidence, it was his duty as an appellate tribunal to reverse the Local Lodge upon the ground that the prescribed constitutional procedures had not been followed. If Truax had prosecuted his appeal, then the action of the International President in affirming the findings of the Trial Committee would have been regular, because then he would be reversing the Local Lodge as to the action it had taken on July 19, the procedures up to that time being legal. Of course, as stated above, the penalty as modified by him was not legal. What we have stated here with reference to the International President applies likewise to the Executive Committee which affirmed his decision.

When the Executive Committee affirmed the decision of the International President and the Local Lodge on February 11, 1952, advised petitioner that it would not continue to accept dues until the penalty fixed by the International President was complied with, the petitioner was deprived of rights and privileges in the union and in effect was suspended from membership (See Respondent's Exhibit E).

Petitioner was, by virtue of said action, prevented from working as a machinist and thereby sustained loss of wages. The petitioner was out of work from March 4, 1952, to June 26, 1953, when he became incapacitated because of illness. We have assessed the damages for said period to be in the sum of \$6,800.00 at the rate of \$100.00 per week, which, as testified by petitioner, was the lowest weekly wage received by him during the years 1950, 1951, and 1952. Had petitioner not been incapacitated by a disabling illness on June 26, 1953, which prevented him from engaging in any employment whatever, this Court would have been obliged to assess damages on the above basis until the date of judgment. The award of damages for \$2,500.00 for mental distress is proper, we believe, under the evidence and all the circumstances, and pursuant to the authority of *Taylor v. Marine Cooks and Stewards*, 117 CA (2d) 556. We did not award any exemplary damages because there is no evidence of malice or fraud on the part of respondents.

With respect to damages, the Court has made a further order to the effect that the trial court retains jurisdiction for the purpose of awarding such additional damages as might be suffered by petitioner until he is actually restored to his rights and privileges in the respondent associations and reinstated to membership therein.

The attorneys for petitioner are directed to prepare Findings of Fact and Conclusions of Law pursuant to the Minute Orders for a Writ of Mandate and for judgment.

for damages heretofore made and pursuant to this memorandum.

Dated: June 7, 1954.

JOHN B. MOLINARI
Judge of the Superior Court

Filed in Open Court July 29, 1954
Martin Mongan, Clerk
By E. Wall, Deputy Clerk

APPENDIX "B"

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND
FOR THE CITY AND COUNTY OF SAN FRANCISCO

No. 423147

MARCOS GONZALES, *Petitioner,*

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, ETC., *et al.,*
Respondents.

Judgment

The above entitled cause came on for trial before the Court sitting without a jury on the 25th day of August, 1953, and again on the 3rd day of February, 1954, and evidence having been received and memorandum of law having been thereafter submitted to the Court, and the cause submitted, and the Court having issued its memorandum of decision and having heretofore made and caused to be filed herein its written findings of fact and conclusions of law, and being fully advised,

WHEREFORE, by reason of the law and the findings of fact aforesaid, it is ORDERED, ADJUDGED AND DECREED that petitioner have and recover from the respondents, and each of them, the sum of Sixty-Eight Hundred Dollars

(\$6,800.00) as damages for lost wages and the sum of Twenty-Five Hundred Dollars (\$2,500.00) as damages for grievous physical and mental pain and suffering, humiliation, anxiety and degradation, with interest thereon at the rate of SEVEN (7) per centum per annum from the date hereof until paid, together with petitioner's costs and disbursements incurred in said action amounting to the sum of \$

IT IS FURTHER ORDERED that a peremptory writ of mandate issue forthwith to respondents, and each of them, directing them to forthwith restore petitioner to all of his rights and privileges in the respondent associations and to forthwith reinstate petitioner as a member in good standing thereof, without payment of any fine or the statement of any apology or other condition.

IT IS FURTHER ORDERED that this Court retains continuing jurisdiction of this cause for the purpose of awarding additional damages or making further orders herein until this judgment and the said preemptory writ of mandate shall have been fully complied with.

DATED: July 29, 1954.

Judge of the Superior Court

Filed Feb. 16, 1956

Walter S. Chisholm, Clerk

By, Deputy

APPENDIX "C"

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT DIVISION ONE

No. 16536

MARCOS GONZALES, *Petitioner and Respondent,*

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, an unincorporated association; THOMAS E. McSHANE, and A. C. McGRAW, as International Representatives thereof; INTERNATIONAL ASSOCIATION OF MACHINISTS, LOCAL LODGE No. 68, an unincorporated association; ROBERT ROLLER, as President of said Local Lodge; REESE CONTE, as Secretary of said Local Lodge; EDWARD PECK, as Treasurer of said Local Lodge, *Respondents and Appellants.*

Opinion

The superior court rendered judgment reinstating petitioner in the International Association of Machinists and awarding him \$6800 damages for loss of wages and \$2500 for mental distress. All respondents* in the lower court are appellants here.

* They are the International Association of Machinists, an unincorporated association, Thomas E. McShane, and A. C. McGraw, as International Representatives thereof; International Association of Machinists, Local Lodge No. 68, an unincorporated association, Robert Roller, as President of said Local Lodge, Reese Conte, as Secretary of said Local Lodge, Edward Peck, as Treasurer of said Local Lodge.

QUESTIONS PRESENTED.

1. Was petitioner excused from exhausting his administrative remedies?
2. Did the lodge violate the constitutions of the organization?
3. Are the International President's interpretations binding on the courts?
4. Damages: Does the Labor Management Relations Act, 1947, 29 U.S.C. § 141 et seq. (Taft-Hartley Act) apply?

FACTS.

This proceeding grew out of the recommendation in 1948 by petitioner, as a member of the investigating committee of the lodge, that one Nelson be denied admission to membership. Thereafter petitioner was physically assaulted by Nelson. Petitioner, believing that the assault was instigated by Charles Truax, who was the International Representative, filed suit in the superior court against both Nelson and Truax for damages for injuries received in the assault. A nonsuit was granted in favor of Truax and a judgment in favor of petitioner against Nelson for \$10,000. July 7, 1950, petitioner was tried by the trial committee of the lodge for violation of article XXV, section 1, Grand Lodge Constitution.* July 19th, the trial committee at the regular bi-monthly meeting submitted to the lodge its verdict—"guilty as charged," and its recommendation that petitioner be expelled from the association. Thereupon pursuant to article K, section 7

* "... any member . . . circulating or causing in any manner to be circulated any false or malicious statement . . . falsely or maliciously attacking the character, impugning the motives or questioning the integrity of any officer of the Grand Lodge . . ." The charges were preferred by Truax and were based upon the allegations in petitioner's complaint in the civil action that Truax directed and ordered Nelson to perpetrate the assault and battery on petitioner.

of the constitution, the membership present voted on the action of the committee.* The vote was 43-31 against sustaining the verdict.** August 2, 1950, at a regular meeting a motion was made to rescind the action of July 19th rejecting the verdict of the trial committee. A standing vote showed 38 yes, 4 no. Thereupon a secret ballot vote was taken on a motion to sustain the "guilty" verdict of the committee. This resulted in 31 yes, 12 no, 2 blank ballots. A secret ballot vote was then taken on a motion to expel petitioner from the association as recommended by the committee. This resulted in 29 yes, 14 no, 1 blank. August 2nd petitioner appealed to the International President from this action of the lodge, claiming among other things that the action of the lodge on August 2nd, after his vindication on July 19th, was a violation of the constitution, and also that the vote for his expulsion was not the required "two-thirds ($\frac{2}{3}$) vote of those voting." November 13th, the Industrial President sent a letter to the president and secretary of the lodge, in which he made formal findings, conclusions and decision. He upheld the conviction of petitioner, but decided that expulsion was too severe a penalty and then modified the penalty to a fine of \$500 to be paid the lodge, and a "complete and appropriate apology" in writing from petitioner to Truax, copy thereof to be sent to the president. January 30, 1951, petitioner received a letter from the General Secretary-Treasurer of the International to the effect that on his appeal of the decision of the International President to the Executive Council that body had unanimously sustained the decision. "Accordingly, President Hayes' decision of November 13, fining you \$500.00, becomes the decision

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of the Executive Council, and our records have been so indicated." February 23, 1951, in reply to a letter from petitioner, asking the course to be followed in appealing the decision of the Executive Council, the General Secretary-Treasurer wrote petitioner calling attention to section 6, article XXV, of the constitution* which provides for appeals to a convention of the Grand Lodge and stated that his appeal could not be sent to the convention nor considered by it "until you have carried out the decision of the Executive Council, which means you must pay the fine of \$500.00 before you can appeal to the convention." February 11, 1952, the lodge's financial secretary notified petitioner that the lodge would no longer accept dues from him until he had complied with the president's decision by paying the \$500 fine and making a complete and appropriate apology to Truax. February 20th, petitioner formally refused to pay the fine or make apology. December 3, 1952, petitioner filed his application for a writ of mandate in the superior court.

Whatever confusion there may have been in this state as to the right of a trade union member to appeal to the courts for redress from his union's action, without first exhausting all remedies provided by its constitution and by-laws, such confusion has been resolved and a definite rule established in the recently decided *Holderby v. Internat. Union etc. Engrs.*, 45 A.C. 867. There the plaintiff was expelled from the union in complete violation of the union's constitution. In holding that he could not appeal to the courts without first availing himself of the remedies

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provided in the constitution for a review by the general board of the action taken against him, the court refused to follow cases like *Weber v. Marine Cooks' & Stewards' Assn.*, 93 Cal. App. 2d 327, which had held that "where an organization has violated its own laws and arbitrarily violated a member's property rights the rule of exhaustion of remedies by appeal to a higher body within the organization need not be adhered to before direct resort to a judicial tribunal." (P. 338.) It then ruled that the union member must exhaust the union remedies before he may appeal to the courts, no matter what the initial violation of union rules may have been, and that the only exception to the general rule is if there has been a violation of the rules on appeal. "It is only when the organization violates its rules for appellate review or upon a showing that it would be futile to invoke them that the further pursuit of internal relief is excused. The violation of its own rules which inflicts the initial wrong furnishes no right for direct resort to the courts." (P. 871.) Therefore we are limited to a determination of whether the union rules on appeal were violated in any respect or whether further pursuit of internal relief is excused.

1. ADMINISTRATIVE REMEDY.

Petitioner followed his administrative remedy through an appeal to the International President and then from his decision to the Executive Council. He did not proceed with an appeal either to the convention of the Grand lodge or to the membership at large. He was barred from so doing by the requirement that he first fully comply with the orders of the Executive Council.

Petitioner contends that the International President and the Executive Council violated the union rules on appeal in deciding that the required two-thirds vote had expelled him and in changing the penalty from expulsion to a fine and apology. As to the finding of the president that there was a two-thirds vote in favor of expulsion,

such finding, if erroneous, could not alone justify non-compliance by petitioner with the appeal rules of the organization. Just as a court has the power to decide wrongly as rightly, the president on appeal likewise has such power and a wrong decision is not the violation of the organization's rules on appeal which under the Hold-erby case justifies the member to further follow the union's rules on appeal. The constitution provides (art. V, § 1) that the president shall decide all constitutional questions subject, however, to the right of appeal.* However, the imposition of an apology requirement would appear to be in a different category. Article XXV, section 1, the section which petitioner was charged with violating, provides a penalty of fine or expulsion, or both. That section is in the Grand Lodge Constitution. In the local lodge constitution (art. K, § 7) it is provided that the membership may substitute another punishment for that recommended by the trial committee. It is questionable whether this gives the membership the right to substitute any penalty other than that included in the phrase "fine or expulsion or both" in the penalty section of the Grand Lodge Constitution. However, we can find no authorization to the president, upon appeal, to change the penalty voted by the lodge. It would appear that his authority is either to affirm or reject the action of the lodge, and in the event he affirms its action in finding a member guilty but, as here, feels that the penalty is too great, he may reverse the penalty but the determination of the new penalty is for the lodge and not for him. It may be that had the

* Nor do we think that the president violated any rules in prescribing a fine *prior to approval* thereof by the Executive Council. Section 8, article K, provides that no fine in excess of \$50 "shall be imposed upon any member . . . unless the same is first approved by the Executive Council." Having in mind that under the appellate procedure an appeal is first to the president and thereafter to the Executive Council, and that this provision is in the constitution of the lodge and not in that of the Grand Lodge, it is obvious that it does not apply to a decision on appeal.

president merely reduced the penalty to a \$500 fine, petitioner could not complain of a departure from the rules so obviously in his favor, as a fine is included in the penalties provided by the constitution. But the requirement of an apology is an entirely different matter. Nowhere is there a provision for such a penalty and it is completely outside the penalties prescribed. This action then constituted not only a violation of the organization's rules for appellate procedure but it brings the case under the second situation stated in the Holderby case, namely, "that it would be futile to invoke" the further appellate rules. They provide that to go further with his appeal petitioner must comply with all orders of the Executive Council. Thus to gain redress petitioner must pay a fine which the president and the Executive Council had no right to impose and to make an apology which neither had the right to require. While the fine money could be refunded if the convention were to reverse the Executive Council's decision, there is no way in which the apology could be wiped out. The effect of these requirements was to prevent petitioner from proceeding further and gave him the right to appeal to the courts for relief.

Appellants contend that the action of the Executive Council, in effect, eliminated the president's requirement of an apology. The General Secretary-Treasurer on January 30, 1951, notified petitioner: "Inasmuch as you failed to supplement your letter of November 16, the Executive Council, at its recent meeting, carefully appraised all of the facts as presented in the correspondence dealing with your case and, after due deliberation, *by unanimous action, voted to sustain the International President's decision.* Accordingly, President Hayes' decision of November 13, fining you \$500.00, becomes the decision of the Executive Council . . ." (Emphasis added.) On February 23rd he notified petitioner that an appeal to the convention, if made, could not be "processed" "until you have carried out the decision of the Executive Council, which means

you must pay the fine of \$500.00 before you can appeal to the convention." On February 11, 1952, the financial secretary of the lodge notified petitioner that the lodge could not accept dues from him until he paid the \$500 fine *and made a complete and appropriate apology*, sending copy to the International President. "This is in accordance with the decision" of the president "and sustained by the Executive Council . . ." It is difficult to understand how the Executive Council "voted to sustain the International President's decision" if it deleted therefrom the apology requirement. Certainly the lodge interpreted the action of the Executive Council as requiring the apology as well as the fine. At the trial counsel for appellants stated: "... it is true that in order to comply with the decision of the International President that the Plaintiff would have to pay \$500 and that we don't dispute that at all, and *it also appears that he would have to make an apology.*" (Emphasis added.) In any event, as a result of the appeal brought by petitioner, he finds himself ousted from his union because of nonpayment of dues, which he would pay but it will not receive, and denied his right of further appeal because he will not do something which the appellate bodies had no right to require him to do. It should be remembered that being ousted or expelled from a union is a matter of much greater consequence than expulsion from a fraternal organization. In the former case, in most instances it means a loss of a member's job, and therefore, his means of making a living. Especially is this so when employers of the type of labor provided by members of this organization only hire through the union hiring hall. At the very least, his no longer belonging to the union would be a serious handicap in the labor market.

The facts bring this case under the exception to the general rule of exhaustion of administrative remedy. We are therefore required to consider whether the acts of the lodge violated the constitution of either the Grand Lodge or the local lodge.

2. LODGE VIOLATIONS..

There is no provision in either constitution for rescinding the action of the membership in voting on the recommendations of a trial committee.* Appellants support such action, however, by contending that the procedure was in accordance with Robert's Rules of Order and that the constitutions make those rules applicable. Article G, section 2 of the local lodge constitution provides: "The Rules of Order governing parliamentary procedure shall be printed in the copies of the Constitution of the Grand Lodge, and no other rules shall apply." In these rules there is nothing upon the subject with which we are here concerned. Article II, section 11 of the Grand Lodge Constitution makes Robert's Rules of Order the parliamentary law of both the Grand Lodge and the local lodge, "except in cases otherwise provided for by this Constitution." If there is any conflict between Robert's Rules and the provisions of either constitution the latter must necessarily prevail. (See *Harris v. Nat. Union etc. Cooks & Stewards*, 98 Cal. App. 2d 733, 736.) The lodge constitution requires that voting on the recommendations of the trial committee be by secret ballot. It would seem to conflict with this requirement to permit a vote to rescind such action to be taken in a less formal way. Here it was taken by a standing vote. At the very least this violated the spirit of the constitution. Moreover, Robert's Rules provide (§ 10, subd. 5, p. 50, Robert's Rules of Order Revised Seventy-fifth Anniversary Edition): "At any future session, the resolution, or other main motion, may be rescinded *in the same way if it had been adopted; . . .*" (Emphasis added.) The action taken here violated that provision. We hold that attempting to rescind an action required to be taken by a secret vote, by a standing vote, is a violation of the constitution and of the rules and was therefore void.

* Truax having appealed to the president from the action taken on July 19th, it is very doubtful if the membership under any theory could modify or rescind the action which was then on appeal.

The action of rescission was taken in petitioner's absence. *Ellis v. American Federation of Labor*, 48 Cal. App. 2d 440, holds (pp. 443-444): "It is settled however in this state and elsewhere that a member of an unincorporated association may not be suspended or expelled, nor a subordinate body suspended or its charter revoked, without charges, notice and a hearing, even though the rules of the association make no provision therefor." While petitioner had notice of the proceedings up to the action exonerating him on July 19th, the action purported to be taken on August 2nd was taken without notice and in his absence. The above mentioned rule would apply to such action. Such action violated "those rudimentary rights which will give him a reasonable opportunity to defend against the charges made. . . . The union's procedure, however, must be such as will afford the accused member substantial justice, and the requirements of a fair trial will be imposed even though the rules of the union fail to provide therefor." (*Carson v. Glass Bottle Blowers Assn.*, 37 Cal. 2d 134, 143.)

Moreover, the vote on the question of expulsion did not produce the required "two thirds ($\frac{2}{3}$) vote of those voting." There were 29 yes votes, 14 noes and 1 blank, cast, or a total of 44 votes. The casting of a blank ballot is voting. To constitute a two-thirds vote of those voting it was necessary to get 30 votes. As only 29 affirmative votes were cast the measure failed and the attempted expulsion cannot stand.*

* While the trial court found that the action of petitioner in charging Truax in the civil action with directing and ordering Nelson to assault him violated article XXV, section 1, "falsely or maliciously attacking the character, impugning the motives or questioning the integrity of any officer of the Grand Lodge" (Truax was such an officer) we deem it unnecessary to consider this finding for the reason that the action of the membership on July 19th in rejecting the trial committee's finding, the matter has become academic.

3. PRESIDENT'S INTERPRETATION.

Appellants contend that the president's interpretation of the constitutions as giving him the power to impose the fine and apology, in holding the rescinding action of the lodge as proper, and in determining that the blank ballot should not be counted, in determining the votes cast, is binding upon the courts. This contention is based upon the rule set forth in *DeMille v. American Fed. of Radio Artists*, 31 Cal. 2d 139, 147: "The practical and reasonable construction of the constitution and by-laws of a voluntary organization by its governing board is binding on the membership and will be recognized by the courts." But the construction placed upon such actions by the president in this case cannot be held to be reasonable under the circumstances. "A clearly erroneous administrative construction of a definite and unambiguous provision of the constitution cannot operate to change its meaning." (*Harris v. Nat. Union etc. Cooks & Stewards*, supra, 98 Cal. App. 2d 733, 737; see also *Mandraccio v. Bartenders Union, Local 41*, 41 Cal. 2d 81, 85; *Riviello v. Journeyman Barbers etc. Union*, 109 Cal. App. 2d 123, 128-129.)

We are not impressed by the fact that the president stated in effect that his conclusion would not have been different if he were considering Truax' appeal from the first action of the lodge rather than petitioner's appeal from its second action. It is only the latter situation with which we have to deal.

4. DAMAGES: JURISDICTION.

The Taft-Hartley Act prescribes in part: "(b) It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: PROVIDED, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership

therein; . . ." (29 U.S.C. § 158; emphasis added.) In construing this section the courts have held that the courts have jurisdiction to restore union membership to a member improperly deprived thereof by his union. As said in *Mahoney v. Sailors' Union of the Pacific* (Wash., 1954) 275 P. 2d 440, improper expulsion by the union does not constitute an "unfair labor practice" which under the act takes jurisdiction away from the courts. (See also *Real v. Curran*, 138 N.Y.S. 2d 809.) But a different situation results when the member seeks damages as a result of such expulsion. The courts hold that the act authorizes the Labor Relations Board to compensate the member for loss of earnings if lost through "the procedures followed by the union whereby employers were caused to discriminate against" such members (*idem*, p. 444); such procedures constitute an unfair labor practice. There are many cases holding it to be an unfair labor practice for the union in any way to cause an employer to fail to employ the discharged member. Among others are *Born v. Laube*, 213 F. 2d 407, cert. den, Oct. 18, 1954, 348 U.S. 855; *Radio Officers' Union, etc. v. National L. R. Bd.*, 347 U.S. 17, 74 S. Ct. 323; *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 75 S. Ct. 480. There are three cases, almost identical in this respect with the one at bar, in which the union after improperly expelling the member, took no active steps to notify the employer not to employ him, but, as here, merely refused to issue the employee a hiring hall card or to dispatch him to the job. In each of those cases it was held that such action constituted an "attempt to cause an employer . . . to discriminate against" the employee (29 U.S.C. § 158), and therefore was an unfair labor practice as to which Congress had given the Labor Relations Board exclusive jurisdiction. (*Mahoney v. Sailors' Union of the Pacific*, *supra*, 275 P. 2d 440; *Sterling v. Local 438, etc.*, (Md., 1955) 113 A. 2d 389; *Real v. Curran*, *supra*, 138 N.Y.S. 2d 809.) In the latter case the court said (p. 812): "If the union caused or attempted to

cause plaintiff's discharge from his existing employment with the United States Lines, as is alleged—*either by hiring procedures, or by causing union members not to work with him—it has committed an unfair labor practice within the contemplation of the section, and the National Labor Relations Board can direct the union to cease and desist from such conduct.*" (Emphasis added.)

As said in *Real v. Curran*, supra, 138 N.Y.S. 2d 809, 813-814, the illegal expulsion of a member from the union does not constitute an unfair labor practice as such and therefore "the Board cannot restore plaintiff's union membership because its power to direct affirmative action is dependent upon its finding of an unfair labor practice. . . . It is the causing or attempting to cause the employer to discriminate against an employee . . . that brings the Board's power into play . . . It is, therefore, concluded that the provisions of the Labor Management Relations Act, 1947, do not exclude the State courts from their traditional jurisdiction to restore to membership a wrongfully expelled member of the union."

Because the withholding from petitioner of the required card to obtain employment and the refusal of the union's dispatcher to send petitioner out on a job constituted unfair labor practices, and consequently the exclusive jurisdiction of the damages issue is in the Labor Relations Board, we are forced to hold that the award of damages by the trial court was beyond the jurisdiction of the court and must be reversed.

Those portions of the judgment awarding petitioner damages are reversed. In all other respects the judgment is affirmed. Petitioner will recover costs.

BRAY, J.

WE CONCUR:

PETERS, P.J.

FRED B. WOOD, J.

Filed June 12, 1956

APPENDIX "D"

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

No. 16536

MARCOS GONZALES, *Petitioner and Respondent,*

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, an unincorporated association; THOMAS E. McSHANE, and A. C. McGRAW, as International Representatives thereof; INTERNATIONAL ASSOCIATION OF MACHINISTS, LOCAL LODGE No. 68, an unincorporated association; ROBERT ROLLER, as President of said Local Lodge; REESE CONTE, as Secretary of said Local Lodge; EDWARD PECK, as Treasurer of said Local Lodge,

Respondents and Appellants.

Opinion

The superior court rendered judgment reinstating petitioner in the International Association of Machinists and awarding him \$6800 damages for loss of wages and \$2500 for mental distress. All respondents* in the lower court are appellants here.

QUESTIONS PRESENTED.

1. Was petitioner excused from exhausting his administrative remedies?

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2. Did the lodge violate the constitutions of the organization?

3. Are the International President's interpretations binding on the courts?

4. Damages: (a) Does the Labor Management Relations Act, 1947, 29 U.S.C.A. § 141 et seq. (Taft-Hartley Act) apply? (b) Is the award supported?

FACTS.

This proceeding grew out of the recommendation in 1948 by petitioner, as a member of the investigating committee of the lodge, that one Nelson be denied admission to membership. Thereafter petitioner was physically assaulted by Nelson. Petitioner, believing that the assault was instigated by Charles Truax, who was the International Representative, filed suit in the superior court against both Nelson and Truax for damages for injuries received in the assault. A nonsuit was granted in favor of Truax and a judgment in favor of petitioner against Nelson for \$10,000. July 7, 1950, petitioner was tried by the trial committee of the lodge for violation of article XXV, section 1, Grand Lodge Constitution.* July 19th, the trial committee at the regular bi-monthly meeting submitted to the lodge its verdict—"guilty as charged," and its recommendation that petitioner be expelled from the association. Thereupon pursuant to article K, section 7 of the constitution, the membership present voted on the action of the

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committee.* The vote was 43-31 against sustaining the verdict.** August 2, 1950, at a regular meeting a motion was made to rescind the action of July 19th rejecting the verdict of the trial committee. A standing vote showed 38 yes, 4 no. Thereupon a secret ballot vote was taken on a motion to sustain the "guilty" verdict of the committee. This resulted in 31 yes, 12 no, 2 blank ballots. A secret ballot vote was then taken on a motion to expel petitioner from the association as recommended by the committee. This resulted in 29 yes, 14 no, 1 blank. August 2nd petitioner appealed to the International President from this action of the lodge, claiming among other things that the action of the lodge on August 2nd, after his vindication on July 19th, was a violation of the constitution, and also that the vote for his expulsion was not the required "two-thirds ($\frac{2}{3}$) vote of those voting." November 13th, the International President sent a letter to the president and secretary of the lodge, in which he made formal findings, conclusions and decision. He upheld the conviction of petitioner, but decided that expulsion was too severe a penalty and then modified the penalty to a fine of \$500 to be paid the lodge, and a "complete and appropriate apology" in writing from petitioner to Truax, copy thereof to be sent to the president. January 30, 1951, petitioner received a letter from the General Secretary-Treasurer of the International to the effect that on his appeal of the decision of the International President to the Executive Council that body had unanimously sustained the decision. "Accordingly, President Hayes' decision of November 13, fining you \$500.00, becomes the decision of the Executive Council, and our records have been so-

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Whatever confusion there may have been in this state as to the right of a trade union member to appeal to the courts for redress from his union's action, without first exhausting all remedies provided by its constitution and by-laws, such confusion has been resolved and a definite rule established in the recently decided *Holderby v. Internat. Union etc. Engrs.*, 45 Cal. 2d 843 [291 P. 2d 463]. There the plaintiff was expelled from the union in complete violation of the union's constitution. In holding that he could not appeal to the courts without first availing himself of the remedies provided in the constitution for a

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1. ADMINISTRATIVE REMEDY.

Petitioner followed his administrative remedy through an appeal to the International President and then from his decision to the Executive Council. He did not proceed with an appeal either to the convention of the Grand Lodge or to the membership at large. He was barred from so doing by the requirement that he first fully comply with the orders of the Executive Council.

Petitioner contends that the International President and the Executive Council violated the union rules on appeal in deciding that the required two-thirds vote had expelled him and in changing the penalty from expulsion to a fine and apology. As to the finding of the president that there was a two-thirds vote in favor of expulsion,

such finding, if erroneous, could not alone justify non-compliance by petitioner with the appeal rules of the organization. Just as a court has the power to decide wrongly as well as rightly, the president on appeal likewise has such power and a wrong decision is not the violation of the organization's rules on appeal which under the Holderby case justifies the member in refusing to further follow the union's rules on appeal. The constitution provides (art. V, § 1) that the president shall decide all constitutional questions subject, however, to the right of appeal.* However, the imposition of an apology requirement would appear to be in a different category. Article XXV, section 1, the section which petitioner was charged with violating, provides a penalty of fine or expulsion, or both. That section is in the Grand Lodge Constitution. In the local lodge constitution (art. K, § 7) it is provided that the membership may substitute another punishment for that recommended by the trial committee. It is questionable whether this gives the membership the right to substitute any penalty other than that included in the phrase "fine or expulsion or both" in the penalty section of the Grand Lodge Constitution. However, we can find no authorization to the president, upon appeal, to change the penalty voted by the lodge. It would appear that his authority is either to affirm or reject the action of the lodge, and in the event he affirms its action in finding a member guilty but, as here, feels that the penalty is too great, he may reverse the penalty but the determination of the new penalty is for the lodge and not for him. It

* Nor do we think that the president violated any rules in prescribing a fine *prior to approval* thereof by the Executive Council. Section 8, article K, provides that no fine in excess of \$50 "shall be imposed upon any member . . . unless the same is first approved by the Executive Council." Having in mind that under the appellate procedure an appeal is first to the president and thereafter to the Executive Council, and that this provision is in the constitution of the lodge and not in that of the Grand Lodge, it is obvious that it does not apply to a decision on appeal.

may be that had the president merely reduced the penalty to a \$500 fine, petitioner could not complain of a departure from the rules so obviously in his favor, as a fine is included in the penalties provided by the constitution. But the requirement of an apology is an entirely different matter. Nowhere is there a provision for such a penalty and it is completely outside the penalties prescribed. This action then constituted not only a violation of the organization's rules for appellate procedure but it brings the case under the second situation stated in the Holderby case, namely, "that it would be futile to invoke" the further appellate rules. They provide that to go further with his appeal petitioner must comply with all orders of the Executive Council. Thus to gain redress petitioner must pay a fine which the president and the Executive Council had no right to impose and to make an apology which neither had the right to require. While the fine money could be refunded if the convention were to reverse the Executive Council's decision, there is no way in which the apology could be wiped out. The effect of these requirements was to prevent petitioner from proceeding further and gave him the right to appeal to the courts for relief.

Appellants contend that the action of the Executive Council, in effect, eliminated the president's requirement of an apology. The General Secretary-Treasurer on January 30, 1951, notified petitioner: "Inasmuch as you failed to supplement your letter of November 16, the Executive Council, at its recent meeting, carefully appraised all of the facts as presented in the correspondence dealing with your case and, after due deliberation, *by unanimous action, voted to sustain the International President's decision.* Accordingly, President Hayes' decision of November 13, fining you \$500.00, becomes the decision of the Executive Council . . ." (Emphasis added.) On February 23rd he notified petitioner that an appeal to the convention, if made, could not be "processed" "until you have carried out the decision of the Executive Council, which means you must

pay the fine of \$500.00 before you can appeal to the convention." On February 11, 1952, the financial secretary of the lodge notified petitioner that the lodge could not accept dues from him until he paid the \$500 fine *and made a complete and appropriate apology*, sending copy to the International President. "This is in accordance with the decision" of the president "and sustained by the Executive Council . . ." It is difficult to understand how the Executive Council "voted to sustain the International President's decision" if it deleted therefrom the apology requirement. Certainly the lodge interpreted the action of the Executive Council as requiring the apology as well as the fine. At the trial counsel for appellants stated: "... it is true that in order to comply with the decision of the International President that the Plaintiff would have to pay \$500 and that we don't dispute that at all, and *it also appears that he would have to make an apology.*" (Emphasis added.) In any event, as a result of the appeal brought by petitioner, he finds himself ousted from his union because of nonpayment of dues, which he would pay but it will not receive, and denied his right of further appeal because he will not do something which the appellate bodies had no right to require him to do. It should be remembered that being ousted or expelled from a union is a matter of much greater consequence than expulsion from a fraternal organization. In the former case, in most instances it means a loss of a member's job, and therefore, his means of making a living. Especially is this so when employers of the type of labor provided by members of this organization only hire through the union hiring hall. At the very least, his no longer belonging to the union would be a serious handicap in the labor market.

The facts bring this case under the exception to the general rule of exhaustion of administrative remedy. We are therefore required to consider whether the acts of the lodge violated the constitution of either the Grand Lodge or the local lodge.

2. LODGE VIOLATIONS.

There is no provision in either constitution for rescinding the action of the membership in voting on the recommendations of a trial committee.* Appellants support such action, however, by contending that the procedure was in accordance with Robert's Rules of Order and that the constitutions make those rules applicable. Article G, section 2 of the local lodge constitution provides: "The Rules of Order governing parliamentary procedure shall be printed in the copies of the Constitution of the Grand Lodge, and no other rules shall apply." In these rules there is nothing upon the subject with which we are here concerned. Article II, section 11 of the Grand Lodge Constitution makes Robert's Rules of Order the parliamentary law of both the Grand Lodge and the local lodge, "except in cases otherwise provided for by this Constitution." If there is any conflict between Robert's Rules and the provisions of either constitution the latter must necessarily prevail. (See *Harris v. Nat. Union etc. Cooks & Stewards*, 98 Cal. App. 2d 733, 736 [221 P. 2d 136].) The lodge constitution requires that voting on the recommendations of the trial committee be by secret ballot. It would seem to conflict with this requirement to permit a vote to rescind such action to be taken in a less formal way. Here it was taken by a standing vote. At the very least this violated the spirit of the constitution. Moreover, Robert's Rules provide (§ 10, subd. 5, p. 50, Robert's Rules of Order Revised Seventy-fifth Anniversary Edition): "At any future session, the resolution, or other main motion, may be rescinded *in the same way if it had been adopted*; . . ." (Emphasis added.) The action taken here violated that provision. We hold that attempting to rescind an action required to be taken by a secret vote, by a standing

* Truax having appealed to the president from the action taken on July 19th, it is very doubtful if the membership under any theory could modify or rescind the action which was then on appeal.

vote, is a violation of the constitution and of the rules and was therefore void.

The action of rescission was taken in petitioner's absence. *Ellis v. American Federation of Labor*, 48 Cal. App. 2d 440 [120 P. 2d 79] holds (pp. 443-444): "It is settled however in this state and elsewhere that a member of an unincorporated association may not be suspended or expelled, nor a subordinate body suspended or its charter revoked, without charges, notice and a hearing, even though the rules of the association make no provision therefor." While petitioner had notice of the proceedings up to the action exonerating him on July 19th, the action purported to be taken on August 2nd was taken without notice and in his absence. The above mentioned rule would apply to such action. Such action violated "those rudimentary rights which will give him a reasonable opportunity to defend against the charges made. . . . The union's procedure, however, must be such as will afford the accused member substantial justice, and the requirements of a fair trial will be imposed even though the rules of the union fail to provide therefor." (*Cason v. Glass Bottle Blowers Assn.*, 37 Cal. 2d 134, 143 [231 P. 2d 6].)

Moreover, the vote on the question of expulsion did not produce the required "two thirds ($\frac{2}{3}$) vote of those voting." There were 29 yes votes, 14 noes and 1 blank, cast, or a total of 44 votes. The casting of a blank ballot is voting. To constitute a two-thirds vote of those voting it was necessary to get 30 votes. As only 29 affirmative votes were cast the measure failed and the attempted expulsion cannot stand.*

* While the trial court found that the action of petitioner in charging Truax in the civil action with directing and ordering Nelson to assault him violated article XXV, section 1, "falsely or maliciously attacking the character, impugning the motives or questioning the integrity of any officer of the Grand Lodge" (Truax

3. PRESIDENT'S INTERPRETATION.

Appellants contend that the president's interpretation of the constitutions as giving him the power to impose the fine and apology, in holding the rescinding action of the lodge as proper, and in determining that the blank ballot should not be counted in determining the votes cast, is binding upon the courts. This contention is based upon the rule set forth in *DeMille v. American Fed. of Radio Artists*, 31 Cal. 2d 139, 147 [187 P. 2d 769, 175 A.L.R. 382]: "The practical and reasonable construction of the constitution and by-laws of a voluntary organization by its governing board is binding on the membership and will be recognized by the courts." But the construction placed upon such actions by the president in this case cannot be held to be reasonable under the circumstances. "A clearly erroneous administrative construction of a definite and unambiguous provision of the constitution cannot operate to change its meaning." (*Harris v. Nat. Union etc. Cooks & Stewards*, supra, 98 Cal. App. 2d 733, 737; see also *Mandraccio v. Bartenders Union, Local 41*, 41 Cal. 2d 81, 85 [256 P. 2d 927]; *Riviello v. Journeyman Barbers etc. Union*, 109 Cal. App. 2d 123, 128-129. [240 P. 2d 361].)

We are not impressed by the fact that the president stated in effect that his conclusion would not have been different if he were considering Truax' appeal from the first action of the lodge rather than petitioner's appeal from its second action. It is only the latter situation with which we have to deal.

was such an officer) we deem it unnecessary to consider this finding for the reason that by the action of the membership on July 19th in rejecting the trial committee's finding, the matter has become academic.

4. DAMAGES: (a) *Jurisdiction.*

In determining the question of whether the exclusive jurisdiction to grant damages in a case of this kind lies in the Labor Relations Board, it is first necessary to determine the character of the pleadings and issues in this case. The petition alleged a breach of contract between the union and plaintiff, one of its members.* It took the form of a petition for writ of mandate because damages alone would not be adequate to restore to petitioner the things of value he had lost by reason of the breach. No charge of "unfair labor practices" appears in the petition. The answer to the petition denied its allegations and challenged the jurisdiction of the court, but said nothing about unfair labor practices. The evidence adduced at the trial showed that plaintiff, because of his loss of membership, was unable to obtain employment and was thereby damaged. However, this damage was not charged nor treated as the result of an unfair labor practice but as a result of the breach of contract. Thus the question of unfair labor practice was not raised nor was any finding on the subject requested of, or made by, the court.

So far as plaintiff's improper expulsion from the union is concerned, there could be no question of unfair labor practice.

The Taft-Hartley Act prescribes in part: "(b) It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title; PROVIDED, *That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . .*" (29 U.S.C.A. §158; emphasis added.) In

* See *Harris v. Nat. Union etc. Cooks & Stewards*, supra, 98 Cal. App. 2d at p. 736: "The constitution of the union constitutes a contract with the members . . ."

construing this section the courts have held that the courts have jurisdiction to restore union membership to a member improperly deprived thereof by his union. As said in *Mahoney v. Sailors' Union of the Pacific*, (1954) 45 Wn. 2d 453 [275 P. 2d 440], improper expulsion by the union does not constitute an "unfair labor practice" which under the act takes jurisdiction away from the courts. (See also *Real v. Curran*, 285 App. Div. 552 [138 N.Y.S. 2d 809].)

So far as the award of damages is concerned, it was awarded not for an unfair labor practice, but for breach of contract and as incidental to the restoration to plaintiff of his right of membership. The contention that the Labor Relations Board has sole jurisdiction of the question of damages in a case of this kind was made and answered in *Taylor v. Marine Cooks & Stewards Assn.*, 117 Cal. App. 2d 556, 564: "Appellants argue that these disputes are solely cognizable by the National Labor Relations Board under the Taft-Hartley Act. (29 U.S.C.A. § 158 (b) 2.) The damages suffered by respondents were an incident of the wrongful act of appellant union in taking disciplinary action against them in a manner which was violative of their rights under the constitution of the union. Nowhere in the Taft-Hartley Act is the N.L.R.B. given jurisdiction or authority to review the legality of any disciplinary action taken by a union against one of its members or to order a member's reinstatement in the union or to award damages resulting from his wrongful expulsion. These powers are left in the courts of law where they have always resided. We find nothing in the Taft-Hartley Act to deprive a court of the power to do complete justice between a wrongfully disciplined member and his union by allowing such damages as he may have suffered as an incident to the judgment restoring him to the rights within the union of which he had been illegally deprived."

There are many cases holding it to be an unfair labor practice for a union in any way to cause an employer to fail to employ an expelled member (whether the expulsion be proper or improper), and that the National Labor Relations Act authorizes the Labor Relations Board to compensate the member for loss of earnings if lost through the procedures followed by the union whereby employers were caused to discriminate against such members. (*Real v. Curran*, *supra*, 138 N.Y.S. 2d 809.)* But in all those cases the *charge was made that the acts of the union constituted unfair labor practices and such charge was an issue in each case.* As we have pointed out it was not an issue here. In *Weber v. Anheuser-Busch, Inc.*, *supra*, 348 U.S. 468, where the issue was whether the unions were guilty of unfair labor practices the court must have had this very distinction in mind for after referring to the "delicate problem of the interplay between state and federal jurisdiction touching labor relations" (p. 474) and after stating (p. 480) "the Labor Management Relations Act 'leaves much to the states, though Congress has refrained from telling us how much'" (quoting from *Garner v. Teamsters Union*, 346 U.S. 485, 488) it prefaced its conclusion that the state court did not have jurisdiction of the unfair labor practices charged, as follows: ". . . where the moving party itself alleges unfair labor practices . . ." (P. 481; emphasis added.) In *United Workers v. Laburnum Corp.*, 347 U.S. 656, the court held that the National Labor Relations Act did not give such exclusive jurisdiction to the National Labor Relations Board as to deprive a Virginia state court of jurisdiction to try a common law tort action brought by a construction company against a union even though

* Among other cases are: *Born v. Laube*, 213 F. 2d 407, cert. den. Oct 18, 1954, 348 U.S. 855; *Radio Officers v. Labor Board*, 347 U.S. 17; *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468; *Mahoney v. Sailors Union of the Pacific*, *supra*, 275 P. 2d 440; *Sterling v. Local 438*, etc. (Md., 1955) 113 A. 2d 389.

the United States Supreme Court assumed the conduct constituted an unfair labor practice under the act.*

In *Real v. Curran*, supra, 138 N.Y.S. 2d 809, where a member allegedly was illegally expelled from his union, the court held that the Labor Relations Board could only act where there was an unfair labor practice, that improperly expelling the member did not constitute such practice and hence the board had no power to restore his union membership. Therefore it held that there was nothing in the Labor Relations Act which would affect the law which had long existed in New York that a wrongfully expelled member of a labor union was entitled to restoration by the state courts to union membership and "in a proper case, damages for consequent loss of wages." (P. 811.) "It is, therefore, concluded that the provisions of the Labor Management Relations Act, 1947, do not exclude the State courts from their traditional jurisdiction to restore to membership a wrongfully expelled member of the union." (P. 814.)

In *International Union, etc. v. Hinz*, 218 F. 2d 664 (U.S. Ct. of Appeals, 6th Cir., 1955) the plaintiff sued the union in the state court of Michigan for damages (not for reinstatement in the union) charging that his union membership had been wrongfully terminated, and asking both compensatory and exemplary damages for loss of wages, etc. The union filed a complaint in the U.S. District Court praying for an injunction against the prosecution of said suit in the state court. In upholding the action of the District Court in dismissing this complaint, the reviewing court held: "Appellee's work did not cease as a consequence of a current labor dispute nor because of an unfair labor practice." (P. 665.) "The Board has no jurisdiction in disputes between a union and its

* It is significant that there, as here, the trial court made no finding that the acts in question did constitute unfair labor practices.

members nor authority over the internal operation of a union." (P. 665. See also *Amalgamated Clothing Workers of America v. Richmond Bros. Co.* (6 Cir.) 211 F. 2d 449, and *International Union of Electrical, Radio and Machine Workers, C.I.O. v. Underwood Corp.*, 219 F. 2d 100.)

In *Holderby v. International Union etc. Engrs.*, supra, 45 Cal. 2d 843, the plaintiff filed an action in which he sought and obtained reinstatement as a member in good standing in the union and damages resulting from his alleged unlawful exclusion therefrom. While the Supreme Court reversed the judgment on the ground of the plaintiff's failure to exhaust his administrative remedy, it is interesting to note that the court nowhere intimates that it did not have jurisdiction of the subject matter of the action. Likewise in *Weber v. Marine Cooks' & Stewards' Assn.*, 123 Cal. App. 2d 328, the plaintiff sued for reinstatement in his union after an alleged wrongful expulsion and for damages in the loss of wages and for mental suffering (just as plaintiff did here). The trial court granted a motion for nonsuit on the ground of laches alone. The reviewing court reversed the judgment and sent the case back for trial. It evidently had no doubt concerning its jurisdiction.

The language of William J. Isaacson in his article, "Labor Relations Law: Federal versus State Jurisdiction," appearing in the May, 1956, *American Bar Association Journal* (vol. 42, No. 5, p. 415) is applicable here. After calling attention to the fact that there is a conflict between the courts, both state and federal, which have considered the question here involved, and that the United States Supreme Court has not passed upon it, and then referring to *Real v. Curran*, supra, 138 N.Y.S. 2d 809, and *Mahoney v. Sailors' Union of the Pacific*, supra, 275 P. 2d 440, the article then states (p. 483): "Although even these state court decisions may lead to possible con-

flict between the federal labor board and state courts they do not present potentialities of conflicts in kind or degree which require a hands off directive to the states. A state court decision requiring restoration of membership requires consideration of and judgment upon matters wholly outside the scope of the National Labor Relations Board's determination with reference to employer discrimination after union ouster from membership. The state court proceedings deal with arbitrariness and misconduct vis-a-vis the individual union members and the union; the Board proceeding, looking principally to the nexus between union action and employer discrimination, examines the ouster from membership in entirely different terms."

DAMAGES: (b) *Award.*

Appellants contend that there is no evidence to support the award of \$6800 damages for loss of wages.* Petitioner testified that his earnings were nearly always \$100 per week at least, and frequently between that figure and \$200. At the time of his expulsion from the union he was employed as a marine machinist by the General Electric Company. About four days thereafter he was injured on the job, incapacitated approximately three weeks. The ordinary practice was for employers to telephone the union hall for men, and the union members would be dispatched to the work. Thereafter he applied to the union for an assignment to a job as he had done prior thereto. He was refused dispatch by the union dispatcher. He testified he sought work directly from the employers but without success. Although there was some testimony to the effect that the union might dispatch a nonmember to a job if he had a letter from the employer requesting him, the dispatcher testified that plaintiff would

*They apparently do not claim the evidence is insufficient to support the award of \$2500 for mental distress.

not have been dispatched even if he had such letter. There was ample evidence to support the award.

The judgment is affirmed.

BRAY, J.

WE CONCUR:

PETERS, P. J.

FRED B. WOOD, J.

APPENDIX "E"

Allegation from Paragraph XV of the Original Petition for Writ of Mandate (Clerk's Tr. 9)

"XV"

From and after March 5, 1952, your petitioner has been unable to secure employment in his former occupation, solely by reason of the illegal, wrongful and improper expulsion and punishment of petitioner by respondent associations"

APPENDIX "F"

Allegations from Petitioners' Original Answer (Clerk's Tr. 26)

"AS AND FOR THE FURTHER AND SEPARATE ANSWER TO SAID PETITION, RESPONDENTS ALLEGE

I.

That the plain, speedy and adequate remedy in the ordinary course of law is available to the petitioner under the provisions of Section 8 (b) (1) and 8 (b) (2) of the National Labor Relations Act as amended."

APPENDIX "G"**Paragraph XII of Finding of Fact (Clerk's Tr. 49)****"XII**

It is true that from March 4, 1952, to June 26, 1953, petitioner has been unable to secure employment at his former occupation solely by reason of the purported expulsion of petitioner from respondent associations. It is true that by reason of petitioner's purported expulsion and as a proximate result thereof, petitioner was caused to and did suffer physical and mental pain and suffering, humiliation and anxiety. It is true that after June 26, 1953, and to the date of trial, petitioner was incapacitated for work because of illness."

APPENDIX "H"**Paragraph V of Conclusions of Law (Clerk's Tr. 52)****V**

That by reason of the purported expulsion of petitioner by respondents, and each of them, petitioner sustained wage loss in the sum of \$6,800 up to the date of his incapacitating illness. That unless and until he is restored to his rights and privileges in the respondent associations and reinstated to membership therein, he may suffer further damages by way of wage loss and otherwise, and this Court has continuing jurisdiction to award such further damages as may in the future be suffered by petitioner until he is actually restored and reinstated as aforesaid.

APPENDIX "T"

Page 29 of Petitioners' Exhibit 9 (trial court designation) being a portion of a collective bargaining agreement which indicates National Labor Relations Board certification of employers involved

APPENDIX "A"

The following employees were named in a certification of representatives in NLRB case No. 20-RC-1275.

San Francisco California Bay Area Port
 Colberg Boat Works
 Columbia Machine Works
 Fulton Shipyard
 DeLano Bros. Co.
 Hyet & Struck Engineering Co.
 George W. Kneass Company
 *Madden & Lewis
 Martinolich Ship Repair Co.
 *Pacific Ship Repair, Inc.
 *Sausalito Shipbuilding Company
 *Stephens Brothers, Inc.
 *Thomas A. Short Co.
 *Thomson Machine Works Co.
 Triple A Machine Shop, Inc.
 Wagner & Niehaus General Machine Shop
 *West Winds, Inc.
 Western Engineering

APPENDIX "J"**Statute Involved**

Labor-Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C., 151 *et seq.* provides in pertinent parts as follows:

SECTION 2(7). The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a

labor dispute burdening or obstructing commerce or the free flow of commerce.

RIGHTS OF EMPLOYEES

SECTION 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3):

UNFAIR LABOR PRACTICES

SECTION 8(b). It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

PREVENTION OF UNFAIR LABOR PRACTICES

SECTION 10(a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means or adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

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JOHN T. PEY, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1957

—
No. 31
—

INTERNATIONAL ASSOCIATION OF MACHINISTS, ET AL.,
Petitioners

v.

MARCOS GONZALES, *Respondent*

—
On Writ of Certiorari to the California
District Court of Appeal

—
BRIEF FOR PETITIONERS
—

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STATUTE:

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IN THE
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No. 31

INTERNATIONAL ASSOCIATION OF MACHINISTS, ET AL.,
Petitioners

v.

MARCOS GONZALES, *Respondent*

On Writ of Certiorari to the California
District Court of Appeal

BRIEF FOR PETITIONERS

OPINIONS BELOW

The June 12, 1956 opinion of the First District Court of Appeal of the State of California is reported at 142 Cal. App. 2d 207, 298 P. 2d 92 (R. 117). The prior February 16, 1956 opinion of the First District Court of Appeal, which was superseded by the June 12, 1956 opinion, is not officially reported but may be found at 139 A.C.A. 2d 263. The June 7, 1954 opinion of the Superior Court is not reported (R. 16). For convenience, the relevant portions of the February 16, 1956

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and the June 12, 1956 opinions of the District Court of Appeal are printed respectively as Appendix A (*infra*, p. 1a) and Appendix B (*infra*, p. 3a).

JURISDICTION

The judgment of the First District Court of Appeal of the State of California was entered on June 12, 1956 (R. 117). A timely petition for hearing was filed in the California Supreme Court and denied on August 8, 1956. A petition for a writ of certiorari was filed on October 31, 1956 and granted on January 14, 1957 (R. 146). 352 U.S. 966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., 141 *et seq.*) are set forth in Appendix C, *infra*, pp. 9a-15a.

QUESTION PRESENTED

The state court entered a judgment against petitioners awarding compensation to respondent for loss of wages and mental distress. It found that petitioners refused to refer respondent for work because he was not a union member, thereby causing employers to refuse to hire respondent. The union conduct redressed by the state court by damages is an unfair labor practice proscribed by Sections 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act, as amended. The question presented is whether the exclusive jurisdiction of the National Labor Relations Board to remedy such conduct is displaced for any of the following reasons: (1) The state court classified the conduct as a breach of contract rather than as an

unfair labor practice; (2) the state court awarded damages for mental distress; and (3) the state court ordered respondent restored to union membership based on its finding that he had been wrongfully expelled.

STATEMENT

In March, 1952, Marcos Gonzales, respondent herein, was expelled from membership in Local Lodge No. 68, International Association of Machinists.¹ Following his expulsion, the Union² refused to dispatch respondent for employment pursuant to a hiring procedure and practice in effect between the Union and employers whose employees the Union represented; this caused employers to refuse to hire him (R. 56-62, 72-73, 92-99, 101-102). As the District Court of Appeal stated (R. 131-132): "The ordinary practice was for employers to telephone the union hall for men, and the union members would be dispatched to the work. Thereafter [following respondent's expulsion] he applied to the union for an assignment to a job as he had done prior thereto. He was refused dispatch by the union dispatcher. He testified he sought work

¹ The Superior Court found that there was sufficient evidence to support the Union Trial Committee's determination that respondent was guilty of the offense with which he was charged within the Union—falsely accusing a union officer of having assaulted him or having instigated an assault upon him (R. 18). It nevertheless found that the penalty for the offense was not imposed in accordance with the internal procedures prescribed by the Union and its parent body, and for that reason the Union could not lawfully expel respondent from membership for refusing to pay the fine and make the apology called for by the penalty (R. 18-21, 118-26).

² The word "Union" is generally used herein to refer to the local lodge.

directly from the employers, but without success. Although there was some testimony to the effect that the union might dispatch a non-member to a job if he had a letter from the employer requesting him, the dispatcher testified that plaintiff would not have been dispatched even if he had such letter."

Respondent filed a charge of unfair labor practices with the National Labor Relations Board and then voluntarily withdrew the charge (R. 65, 67-68).³ Instead, on December 3, 1952, respondent instituted suit in the Superior Court of California, City and County of San Francisco (R. 1). Based upon his allegation that his expulsion from union membership resulted from "illegal procedures," respondent sought an order restoring him to membership in the Union in good standing (R. 6-7). Based upon his allegation that he "has been unable to secure employment in his former occupation" by reason of his expulsion, respondent also sought recompense for "loss of earnings" (R. 6-7). He thereafter amended his complaint to request exemplary damages and compensation for mental distress as well (R. 15). In answer, the Union alleged in part that "the plain, speedy and adequate remedy in the ordinary course of law is available to [respondent]

³ It is undisputed that the requisite affect upon interstate commerce to confer jurisdiction upon the NLRB existed. Following his expulsion from the union, respondent was refused work at Columbia Machine Company, Triple A Machine Shop, Wagner-Niehlaus, and Matson Navigation Company (R. 58). The Union had been certified by the NLRB as the representative of the employees of the first three named employers (R. 134). The Union was also certified as the representative of the employees of Pacific Ship Repair, Inc. (R. 134), where respondent last worked in February 1952 (R. 63). From 1950 to 1952, respondent worked as a marine machinist for the General Electric Company (R. 55). Respondent worked primarily on ocean-going vessels (R. 36).

under the provisions of Sections 8(b)(1) and 8(b)(2) of the National Labor Relations Act as amended" (R. 13).

After trial, the Superior Court entered a judgment requiring the Union to restore respondent to membership in good standing (R. 16). It also "awarded damages only against . . . International Association of Machinists (Grand Lodge) and International Association of Machinists, Local Lodge No. 68, for \$6,800.00 damages for loss of wages and \$2,500.00 damages for mental suffering, humiliation and distress" (R. 16). The Superior Court denied exemplary damages (R. 21).

The jurisdiction of the state court to restore respondent to Union membership alone is not disputed. The jurisdiction of the state court to enter a money judgment for damages to compensate respondent for loss of wages and mental distress resulting from loss of employment caused by the discriminatory refusal to refer him for work is disputed. On appeal, the District Court of Appeal at first agreed with petitioners that no such jurisdiction existed, and it vacated the whole of the money judgment. It stated (*infra*, pp. 1a-3a):

The Taft-Hartley Act prescribes in part: "(b) It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to acquisition or retention of membership therein; . . .*" (29 U.S.C. § 158; emphasis added [by the court].) In construing this section the courts have held that the courts have jurisdiction to restore union membership to a member improper-

erly deprived thereof by his union. As said in *Mahoney v. Sailors' Union of the Pacific* (Wash., 1954) 275 P. 2d 440, improper expulsion by the union does not constitute an "unfair labor practice" which under the act takes jurisdiction away from the courts. (See also *Real v. Curran*, 138 N.Y.S. 2d 809.) But a different situation results when the member seeks damages as a result of such expulsion. The courts hold that the act authorizes the Labor Relations Board to compensate the member for loss of earnings if lost through "the procedures followed by the union whereby employers were caused to discriminate against" such members (*idem*, p. 444); such procedures constitute an unfair labor practice. There are many cases holding it to be an unfair labor practice for the union in any way to cause an employer to fail to employ the discharged member. Among others are *Born v. Laube*, 213 F. 2d 407, cert. den. Oct. 18, 1954, 348 U.S. 855; *Radio Officers' Union, etc. v. National L. R. Bd.*, 347 U.S. 17, 74 S.Ct. 323; *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 75 S.Ct. 480. There are three cases, almost identical in this respect with the one at bar, in which the union after improperly expelling the member, took no active steps to notify the employer not to employ him, but, as here, merely refused to issue the employee a hiring hall card or to dispatch him to the job. In each of those cases it was held that such action constituted an "attempt to cause an employer . . . to discriminate against" the employee (29 U.S.C. § 158), and therefore was an unfair labor practice as to which Congress had given the Labor Relations Board exclusive jurisdiction. (*Mahoney v. Sailors' Union of the Pacific*, *supra*, 275 P. 2d 440; *Sterling v. Local 438*, etc., (Md., 1955) 113 A. 2d 389; *Real v. Curran*, *supra*, 138 N.Y.S. 2d 809). In the latter case the court said (p. 812): "If the union caused or attempted to

cause plaintiff's discharge from his existing employment with the United States Lines, as is alleged—either by hiring procedures, or by causing union members not to work with him—it has committed an unfair labor practice within the contemplation of the section, and the National Labor Relations Board can direct the union to cease and desist from such conduct.” (Emphasis added [by the court].)

* * *

Because the withholding from petitioner of the required card to obtain employment and the refusal of the union's dispatcher to send petitioner out on a job constituted unfair labor practices, and consequently the exclusive jurisdiction of the damages issue is in the Labor Relations Board, we are forced to hold that the award of damages by the trial court was beyond the jurisdiction of the court and must be reversed.

On rehearing, the District Court of Appeal reversed itself and restored the money judgment. It stated that, “So far as the award of damages is concerned, it was awarded not for an unfair labor practice, but for breach of contract [the court taking the view that the constitution of the union constitutes a contract with the members] and as incidental to the restoration to plaintiff of his right of membership” (R. 127, *infra*; p. 4a). It recognized that there “are many cases holding it to be an unfair labor practice for a union in any way to cause an employer to fail to employ an expelled member (whether the expulsion be proper or improper), and that the National Labor Relations Act authorizes the Labor Relations Board to compensate the member for loss of earnings if lost through the procedures followed by the union whereby employers

were caused to discriminate against such members" (R. 128, *infra*, p. 5a). But it distinguished the exclusive jurisdiction of the National Labor Relations Board in those cases from the instant situation on the ground that "in all those cases the charge was made that the acts of the union constituted unfair labor practices and such charge was in issue in each case" (R. 128, *infra*, p. 5a). It was of the view that here the "damage was not charged nor treated as the result of an unfair labor practice but as a result of the breach of contract" (R. 127, *infra*, p. 3a). In the preceding sentence it stated that "the evidence adduced at the trial showed plaintiff because of his loss of membership was unable to obtain employment and was thereby damaged." The court also did not advert to the fact that petitioners in their answer had explicitly put in issue the availability of a remedy "under the provisions of Sections 8(b)(1) and 8(b)(2) of the National Labor Relations Act as amended" (R. 13), nor to the fact that respondent had filed a charge of unfair labor practices with the National Labor Relations Board (R. 65, 67-68).

SUMMARY OF ARGUMENT

1. The state court entered a judgment against petitioners awarding compensation to respondent for loss of wages and mental distress. Petitioners refused to refer respondent for work because he was not a member of the union, thereby causing employers to refuse to hire respondent. The conduct redressed by the state court by an award of damages is an unfair labor practice proscribed by Section 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act, as amended.

2. It is settled law that the National Labor Relations Board has exclusive jurisdiction to investigate, adjudicate, and remedy conduct which is an unfair labor practice under the National Labor Relations Act.

3. The exclusive jurisdiction of the National Labor Relations Board cannot be displaced by the state court because it labels the basis of its intervention as adjudicating a breach of contract. It is the conduct which the state court presumes to regulate, and not the label which it chooses to affix to it, which is decisive.

4. Nor can the exclusive jurisdiction of the National Labor Relations Board be displaced by the state court because it awards damages for mental distress. That the state court would afford a different remedy than would the National Labor Relations Board, far from vesting the state court with jurisdiction, illustrates a reason why the Board's jurisdiction is exclusive.

5. Finally, the power of the state court to restore an individual to union membership upon its finding that he was wrongly expelled carries with it no authority to award him damages for loss of employment caused by his lack of union membership. Compliance with a federal statutory scheme for regulation of union conduct embodied in Section 8(b) of the Act demands that the authority of the state over local questions not displace the Board's exclusive jurisdiction in carrying out a national policy in the enforcement of the National Labor Relations Act. The goal of attaining uniformity in national questions of labor relations would be frustrated if the existence of a local question in any controversy empowered the state to determine also those questions vested solely in the National Board.

ARGUMENT

A STATE COURT HAS NO JURISDICTION TO ENTER A JUDGMENT AGAINST A UNION AWARDING COMPENSATION FOR LOSS OF WAGES AND MENTAL DISTRESS RESULTING FROM LOSS OF EMPLOYMENT CAUSED BY UNION ACTIVITY PROSCRIBED AS UNFAIR LABOR PRACTICES BY SECTIONS 8(b)(1)(A) AND 8(b)(2) OF THE NATIONAL LABOR RELATIONS ACT

I. THE CONDUCT REDRESSED BY THE STATE COURT BY DAMAGES IS AN UNFAIR LABOR PRACTICE PROSCRIBED BY SECTIONS 8(b)(1)(A) AND 8(b)(2) OF THE NATIONAL LABOR RELATIONS ACT

The Union refused to dispatch respondent to work because he was not a union member, thereby causing employers to refuse him employment. The state court awarded respondent money damages for the ensuing loss of wages and mental distress. The conduct for which redress was granted is a common unfair labor practice condemned by the National Labor Relations Act. The narrow area of valid application of a lawful union security agreement aside, discrimination in employment based upon union membership or the want of it is an unfair labor practice when engaged in by an employer (Sec. 8(a)(3) and (1) of the NLRA), or when caused or attempted by a union (Sec. 8(b)(2) and (1)(A) of the NLRA). *Radiq Officers' Union v. National Labor Relations Board*, 347 U.S. 17.⁴

⁴ See also, *Born v. Laube*, 213 F. 2d 407 (C.A. 9), rehearing denied, 214 F. 2d 349, cert. denied, 348 U.S. 855; *Mahoney v. Sailors' Union*, 45 Wn. 2d 453, 275 P. 2d 440, cert. denied, 349 U.S. 915; *Sterling v. Local 438, Liberty Assn. of Steam and Power*, 207 Md. 132, 119 A. 2d 389, cert. denied, 350 U.S. 875; *McNish v. American Brass Co.*, 139 Conn. 44, 89 A. 2d 566, cert. denied, 344 U.S. 913; *Real v. Curran*, 285 App. Div. 552, 138 N.Y.S. 2d 809; *Morse v. Carpenters Union*, 304 P. 2d 1097 (Idaho).

Indeed, the conduct in *Radio Officers* is the prototype of that here. There, the union declined to clear an employee for a job with a steamship company in accordance with the hiring procedure because of the employee's claimed lack of union membership in good standing. 347 U.S. at 28-33. Here, the union declined to refer respondent for employment in accordance with the hiring procedure because of his expulsion from union membership. And in *Radio Officers*, after enforcement of the National Labor Relations Board order, a supplemental intermediate report was issued in which the trial examiner recommended an order requiring the union to "pay to Willard Fowler [the employee discriminated against] the sum of \$17,855.37 in satisfaction of the order directing the Respondent [union] to make Fowler whole." So here, the state court money judgment is designed in major part to make respondent whole for his loss in wages.

It is, therefore, plain that the state court has taken in hand the identical conduct regulated by the National Labor Relations Act, and has awarded a remedy which parallels that conferred by the National Labor Relations Board for that conduct.

II. THE NATIONAL LABOR RELATIONS BOARD HAS EXCLUSIVE JURISDICTION OVER CONDUCT WHICH IS AN UNFAIR LABOR PRACTICE UNDER THE NATIONAL LABOR RELATIONS ACT

This case is squarely within the settled rule that redress of discrimination in employment is within the sole jurisdiction of the National Labor Relations Board to the exclusion of any other tribunal. *Guss v. Utah*

⁵ *Radio Officers' Union*, Case No. 2-CB-91, November 1956, p. 16. The case was closed upon compromise compliance with the trial examiner's recommended order.

Labor Relations Board, 353 U.S. 1 (discriminatory discharge in violation of Section 8(a)(3), among other violations alleged); *San Diego Building Trades Council v. Garmon*, 353 U.S. 26 (picketing to compel the adoption of an invalid union security agreement in violation of Section 8(b)(2)); *Garner v. Teamsters Union*, 346 U.S. 485 (picketing to coerce the employers into compelling or influencing their employees to join the union in violation of Section 8(b)(2)); *Plankinton Packing Co. v. Wisconsin Employment Relations Board*, 338 U.S. 953 (discriminatory discharge in violation of Section 8(a)(3)).

It is noteworthy that in each of the cited cases, as here, an aspect of discrimination in employment was involved, either as a violation of Section 8(a)(3), or its counterpart, Section 8(b)(2). But the rule of preemption of state action is general, and applies whenever the conduct in controversy is within the regulatory power of the National Labor Relations Board. *Amalgamated Meat Cutters v. Fairlawn Meats*, 353 U.S. 20; *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468; *Local 25, Teamsters Union v. N.Y., N.H. & H. R.R.*, 350 U.S. 155. The necessity of avoiding diversities and conflicts has been repeatedly recognized. As this Court stated in *Garner v. Teamsters Union*, 346 U.S. 485, 489-491:

The question then is whether the State, through its courts, may adjudge the same controversy and extend its own form of relief.

Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and ap-

plication of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. * * * A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.

Diversities and conflicts avoided by federal preemption would inevitably ensue if state courts adjudicated the often difficult and complex problems which inhere in cases of alleged discrimination in employment. Formulation and application of standards pertinent to these problems is a continuing function of the National Labor Relations Board. To permit the same problems to be concurrently handled by the necessarily ad hoc and sporadic adjudication of a court of general jurisdiction is bound to result in disparity.

This case, therefore, is squarely within the settled rule preempting state court adjudication. We turn to the considerations which may be suggested as excepting it from the rule.

III. THE CHARACTERIZATION WHICH THE STATE PLACES UPON THE CONDUCT IS NOT DETERMINATIVE OF THE EXCLUSIVE JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD

The California court justified its assertion of jurisdiction by stating it was adjudicating a breach of con-

tract and not an unfair labor practice (*supra*, pp. 7-8). Whether or not the record would justify this view, it is beside the point. It is the conduct which the state court presumes to regulate, not the label which it chooses to affix to it, that is decisive. Congress having taken the subject matter in hand, California is no more free to act in the name of breach of contract than Missouri was in the name of restraint of trade⁶ or Pennsylvania, Wisconsin, or Utah in the name of their state labor relations statutes.⁷ "... [W]hen two separate remedies are brought to bear on the *same activity*, a conflict is imminent." *Garner v. Teamsters Union*, 346 U.S. 485, 490 (emphasis added).⁸ And so state action is precluded. "Controlling and therefore superseding Federal power cannot be curtailed by the State even though the ground of intervention be different than that on which federal supremacy has been exercised." *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 479.

IV. THE EXCLUSIVE JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD CANNOT BE DISPLACED BY THE STATE COURT AWARDED DAMAGES FOR MENTAL DISTRESS FOR CONDUCT CONSTITUTING UNFAIR LABOR PRACTICES

The power of the state court to act cannot be founded upon the fact that it, unlike the National Labor Relations Board, awards damages to compensate the employee for the mental distress caused by his

⁶ *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468 (restraint of trade under Missouri common law and conspiracy statutes).

⁷ *Garner v. Teamsters Union*, 346 U.S. 485 (Pennsylvania Labor Relations Act); *Plankinton Packing Co. v. Wisconsin Employment Relations Board*, 338 U.S. 953 (Wisconsin Employment Peace Act); *Guss v. Utah Labor Relations Board*, 353 U.S. 1 (Utah Labor Relations Act).

discriminatory loss of employment.⁸ The difference in the remedy employed by the state court and the National Board, far from supporting the conclusion that state power to act exists, emphasizes the reason why it does not. For just such disparity illustrates the conflict that preemption is designed to avoid. The Court of Appeals for the Ninth Circuit, in holding that the Board's lack of power to assess punitive damages does not provide a basis for state action, explained that (*Born v. Laube*, 213 F. 2d 407, 410, cert. denied, 348 U.S. 855):

It is argued that the Board, although having authority to require the offending union to reinstate and financially to make whole the victim of the unfair labor practice, is without power to assess punitive damages; consequently, the view should be taken that Congress did not intend to preclude the victim from enforcing this private right in an action at common law. However, we think it evident that since the Act provides a procedure for redress and a corresponding

⁸ It seems clear that the state court's award of \$2,500 damages for mental distress was based upon the distress found to be caused by respondent's discriminatory loss of employment and not for other reasons outside the purview of the National Labor Relations Act. Thus, the District Court of Appeal in its first opinion, when it held that the state court was without power to award damages for discriminatory loss of employment, vacated the whole of the money judgment and did not attempt to allocate any part of it to causes other than loss of employment (*infra*, pp. 2a-3a). And the evidence at the trial shows that the distress claimed by respondent related to his loss of employment (R. 101-113). In any event, assuming *arguendo* that the money judgment for mental distress is allocable partially to reasons other than loss of employment, a remand to the state court is necessary, for it entered a "unitary judgment . . . based on the erroneous premise that it had power to reach the Union's conduct in its entirety." *Amalgamated Meat Cutters v. Fairlawn Meats*, 353 U.S. 20, 24-25.

remedy, both the procedure and the remedy are exclusive in the absence of an express provision or Board delegation to the contrary. As said in *Nathanson v. NLRB*, 344 U.S. 25, 27: "A back pay order is a reparation order designed to vindicate the public policy of the statute by making the employees whole for losses suffered on account of an unfair labor practice. (Citation). Congress has made the Board the only party entitled to enforce the Act." A remark of Justice Holmes in *Charleston & Western Carolina Railway Co. v. Varnville Furniture Company*, 237 U.S. 597, 604, though dealing with an unrelated subject, is pertinent here. "When Congress," he said, "has taken the particular subject matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go."

When Congress confers a right and creates a remedy, it has expressed its judgment as to the desirable scope of regulation, and state action to supplement it is as ineffective as state action to subtract from it. *Missouri Pacific R.R. Co. v. Porter*, 273 U.S. 341, 345-346. Indeed, if all that were necessary to confer state power over conduct regulated by the National Labor Relations Act would be to seek and secure a state remedy by way of exemplary damages or damages for mental distress, there would be no aspect of such conduct which could not be subjected to concurrent state and federal control.⁹ For example, a

⁹ As in *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 480, so here, it suffices to say of *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656, that there "the violent conduct was reached by a remedy having no parallel in, and not in conflict with, any remedy afforded by the federal act." As the Court of Ap-

discriminatorily discharged employee, by claiming in a state court mental distress in connection with his discharge, could then sue his employer and also claim compensation for loss of wages which would otherwise be solely remediable by the National Labor Relations Board.

Furthermore, as another example of the disparity that may arise, the federal and state remedy is significantly different in the formula used to compensate the employee for his loss of earnings. At common law, the measure of damages for the breach by the employer of a contract of employment "is what an employee would have earned if he had not been wrongfully discharged, less what he did earn during the period of the breach." *National Labor Relations Board v. Seven-Up Bottling Co.*, 344 U.S. 344, 355 (dissent). The National Labor Relations Board does not deduct interim earnings for the full period from discharge to offer of reinstatement to employment. Instead, the Board uses a quarterly period of computation, and deducts from what the employee would have earned only those interim earnings which he received during each quarter. *National Labor Rela-*

peals for the Ninth Circuit observed in denying rehearing in *Born v. Laube*, 214 F. 2d 349 (C.A. 9), cert. den. 348 U.S. 855, the complainant, in *Laburnum*, "was wholly without remedy in damages for the tortious conduct of the Union. Here the complaining employee had available the remedy of reinstatement with back pay. Moreover, unlike *Laburnum*, there was no violence or threat of violence which might serve to bring the cause within the area of the . . . police power." See also, *Mahoney v. Sailors' Union of the Pacific*, 45 Wash. 2d 453, 275 P. 2d 440, 445, cert. denied 349 U.S. 915; *Sterling v. Local 438, Liberty Association*, 207 Md. 132, 113 A. 2d 389, 395-396, cert. denied, 350 U.S. 875.

tions Board v. Seven-Up Bottling Co., supra. Unquestionably, the Boards's method of computation results in greater compensation than the common law rule affords, and designedly so in order to effectuate the reinstatement remedy. It is thus clear that the remedy by way of damages to redress discrimination in employment presents considerations of the "relation of remedy to policy [which] is peculiarly a matter for administrative competence. . . ." *Id.* at 349. To permit a state court to award damages for conduct within the same field covered by the National Act cannot but help to create conflicts with the federal administration and policy.

V. THE EXCLUSIVE JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD TO REMEDY DISCRIMINATION IN EMPLOYMENT IS NOT DISPLACED BY THE STATE COURT'S EXERCISE OF ITS AUTHORITY TO RESTORE AN INDIVIDUAL TO UNION MEMBERSHIP

The exclusive jurisdiction of the National Labor Relations Board to make an employee whole for denial of employment to him based on his lack of union membership is not displaced by the state court's exercise of its authority to restore that employee to union membership from which he was wrongfully expelled.¹⁰ The two facets of the matter are separate and distinct. Authority of the state over membership in a voluntary association does not carry with it authority to award damages to compensate an employee for discriminatory denial of employment. *Mahoney v. Sailors' Union*, 45 Wn. 2d 453, 275 P. 2d

¹⁰ The question whether or not the court below properly decided that respondent was wrongfully expelled is not before this Court.

440, cert. denied, 349 U.S. 915;¹¹ *Real v. Curran*, 285 App. Div. 552, 138 N.Y.S. 2d. 809. In each of these cases, the state court stopped with restoring the individual to union membership; it recognized that it would be beyond its province, and an invasion of the exclusive jurisdiction of the Board, also to remedy the discriminatory denial of employment to the individual by awarding him compensation for loss of earnings.

We shall show that, under the regulatory scheme of the National Labor Relations Act, Congress has

¹¹ Recently, in *Selles v. Local 174, Teamsters Union*, 40 LRRM 2573, 2576-2577 (Wash. Sup. Ct., August 8, 1957), the Washington Supreme Court reaffirmed its position in the *Mahoney* case. It nevertheless drew an untenable distinction between an employee's attempt to secure reinstatement to his job and back pay, which the court held was within the exclusive jurisdiction of the NLRB, and an employee's attempt to secure back pay only, which the court held the state had power to entertain as a common law tort of interference with employment. The distinction is untenable because the NLRB in the exercise of its jurisdiction frequently awards back pay without also awarding reinstatement. Thus, the NLRB, without ordering reinstatement, awards back pay (1) when the employee has found a better job and does not wish to be reinstated, (2) when the employee has incurred an intervening physical disability and is not qualified for reinstatement, (3) when he has been reinstated prior to the NLRB's order but has not received back pay for the period during which the discrimination persisted, or (4) when the employer has since discontinued his business so that there is no longer a job to which the employee can be reinstated. See *Radio Officers' Union v. National Labor Relations Board*, 347 U.S. 17, 54-55; *Phelps Dodge Corp. v. National Labor Relations Board*, 113 F. 2d 202, 205 (C.A. 2), affirmed, 313 U.S. 177, 200; *Indianapolis Power & Light Co. v. National Labor Relations Board*, 122 F. 2d 757, 763 (C.A. 7), cert. denied, 315 U.S. 804; *George C. Quinley*, 92 NLRB 877, 880. The *Selles* case illustrates the inevitable confusion which results whenever a state court seeks to remedy any segment of discrimination in employment.

separated the field of internal union membership from the field of discrimination in employment; that the area within which the state remains free to operate is confined to internal union membership; that the area which is confided to the Board's sole responsibility is the field of discrimination in employment; and that to permit the state to pass from its field to the Board's field will obliterate the line that Congress has drawn and will work the disruption which preemption is designed to avoid.

1. *The field of internal union membership*: Whether to restore an individual to union membership from which he was allegedly wrongfully expelled presents considerations outside the concern of the National Labor Relations Act. As this case illustrates (R. 117-126), the questions presented are peculiar to the law of voluntary associations: whether internal union remedies have been exhausted, whether the wrong alleged is a punishable offense, whether evidence supports the finding of guilt, whether the internal union procedures for trial, punishment, and review have been followed by the association, whether they are consistent with fair procedure, and the like.¹² The National Labor Relations Act is indifferent to these questions and the Board claims no responsibility in relation to them. The state court can, therefore, operate within this field without intruding upon any matter of exclusive federal concern.

Thus, while Section 8(b) (1) (A) of the National Labor Relations Act forbids restraint and coercion of employees by unions, the proviso to it is explicit that

¹² See Sumners, *Legal Limitations On Union Discipline*, 64 Harv. L. Rev. 1049 (1951).

"this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership." Because the sponsors of Section 8(b) (1) (A) did not intend "to affect at least that part of the internal administration which has to do with the admission or the expulsion of members" (93 Cong. Rec. 4271), Senator Holland introduced the proviso to "make it clear that the pending amendment would have no application to or effect upon the right of a labor organization to prescribe its own rules of membership either with respect to beginning or terminating membership" (93 Cong. Rec. 4272). Senator Ball who sponsored Section 8(b) (1) (A) agreed to incorporating the proviso, explaining that "It was never the intention of the sponsors . . . to interfere with the internal affairs or organization of unions," and adding that the union "can expel [a member] from the union at any time it wishes to do so, and for any reason" (93 Cong. Rec. 4272). In conference, the conferees rejected a provision of the House bill¹³ which prohibited expulsion from union membership except under specified conditions, and adopted, in its stead, the proviso to Section 8(b) (1) (A).¹⁴

¹³ H.R. 3020, 80th Cong., 1st Sess., Sec. 8(c) (6).

¹⁴ H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 46.

Similarly, while Section 8(a) (3) of the amended Act bans the closed shop and prohibits union membership from being a condition of employment except in narrow circumstances, it is clear that this does not affect a union's right to control its own membership according to its own standards. The Senate Committee explained (S. Rep. No. 105, 80th Cong., 1st Sess., pp. 20, 21):

The committee did not desire to limit the labor organization with respect to either its selection of membership or expulsion

Accordingly, regardless of its reason, a labor organization's exertion of union discipline, when exercised only by internal regulation of the terms of the acquisition and retention of membership, is excluded by the proviso to Section 8(b) (1) (A) from being an unfair labor practice. *American Newspaper Publishers Ass'n. v. National Labor Relations Board*, 193 F. 2d 782, 800 (C.A. 7), cert. denied on this question, 344 U. S. 812; *Union Starch & Refining Co. v. National Labor Relations Board*, 186 F. 2d 1008, 1012 (C.A. 7), cert. denied, 342 U.S. 815. A state can therefore

therefrom. * * * It is to be observed that unions are free to adopt whatever membership provisions they desire * * *.

Senator Taft stated (93 Cong. Rec. 4193):

The pending measure does not propose any limitation with respect to the internal affairs of unions. They still will be able to fire any members they wish to fire, and they still will be able to try any of their members.

The line drawn is clearly marked as well in a colloquy between Senators Taft, Ball, and Pepper (93 Cong. Rec. 4272):

Mr. Taft. * * * The union could refuse membership; but if the man were an employee of the company with which the union was dealing, the union could not demand that the company fire him. The union could refuse the man admission to the union, or expel him from the union; but if he were willing to enter the union and pay the same dues as other members of the union, he could not be fired from his job because the union refused to take him.

Mr. Pepper. And the union can admit to membership anyone it wishes to admit, and decline to admit anyone it does not wish to accept.

Mr. Ball. That is correct. But the union cannot, by declining membership for any other reason than nonpayment of dues, thereby deprive the individual concerned of the right to continue in his job. In other words, it cannot force the employer to discharge him.

restore an individual to union membership, and can determine the questions relevant to the issues of retention of membership in a voluntary association, without in any degree colliding with federal authority.

2. *The field of discrimination in employment:* When a state court departs from the field of internal union membership and enters the field of discrimination in employment, it at once invades the area of exclusive federal concern. For, while a union is free, so far as the federal statute is concerned, to adopt and pursue any membership policy it deems wise, to exert any internal union discipline it desires, and to deny or terminate membership on any ground it chooses, the essence of the statutory scheme is that a union is forbidden to exercise control over employment based on any aspect of an employee's status with the union other than to compel dues payment through a union security agreement. Union membership or the lack of it and the right to a job are divorced. And the statute commits to the Board alone the authority to protect an employee's employment rights. The heart of the statutory scheme as it relates to discrimination in employment, and consequently the area of exclusive federal concern, was authoritatively expressed by this Court in *Radio Officers' Union v. National Labor Relations Board*, 347 U.S. 17, 40-42:

The policy of the Act is to insulate employee's jobs from their organizational rights. Thus §§ 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood. The only limitation Congress has chosen to impose on this right is specified in the proviso to § 8(a)(3), which authorizes employers to enter

into certain union security contracts, but prohibits discharge under such contracts if membership "was not available to the employee on the same terms and conditions generally applicable to other members" or if "membership was denied or terminated for reasons other than the failure of the employee to tender periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership." Lengthy legislative debate preceded the 1947 amendment to the Act which thus limited permissible employer discrimination. This legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees. Thus Congress recognized the validity of unions' concern about "free riders," i.e., employees who receive the benefits of union representation but are unwilling to contribute their share of financial support to such union, and gave unions the power to contract to meet that problem while withholding from unions the power to cause the discharge of employees for any other reason. Thus an employer can discharge an employee for nonmembership in a union if the employer has entered a union security contract valid under the Act with such union, and if the other requirements of the proviso are met. No other discrimination aimed at encouraging employees to join, retain membership, or stay in good standing in a union is condoned.

3. *To permit the state to pass from its field to the Board's field creates the conflict that preemption is designed to avoid:* The field of discrimination in employment is the exclusive concern of the Board; the field of internal regulation of the acquisition or retention of union membership is within the authority of the state. When, as here, a state court awards damages

to compensate an employee for discriminatory denial of employment, it inescapably invades the area of exclusive federal responsibility. The disparity and conflict it creates is no less because it does so in conjunction with restoration of the employee to union membership. All the considerations which forbid it to act within the field of employment obtain just as well.

The state and federal tribunals can move within their respective orbits without risk of collision. When they confine their activity to their own orbits they respect the line which the federal statute enjoins. But a state court's authority to act within its area of responsibility implies no authority to overstep it.

Congress did not intend its detailed regulation of discrimination in employment contained in Sections 8(a) (3) and 8(b) (2) of the Act to be duplicated by local law, or to be adjudicated by a local tribunal, simply because the right to membership under local law might also be raised. Discrimination in employment not infrequently occurs in connection with expulsion from a union. Congress knew this, and certainly did not intend that a multiplicity of tribunals adjudicate prohibitions in the Act concerning union discrimination in such cases, for it enacted these prohibitions at the same time it specifically exempted from the scope of the Act any control over internal union affairs. Nothing in the federal statute suggests that Congress intended that there should be local handling of the federal question whenever the right to union membership was put in issue in conjunction with discrimination in employment. To permit the state court's authority over the membership segment of a controversy to be the basis for state jurisdiction over the whole

would clearly disrupt the federal statutory scheme in a significant number of discrimination cases. In *Amalgamated Meat Cutters v. Fairlawn Markets, Inc.*, 353 U.S. 20, 24, the fact that the state might "frame and enforce an injunction aimed narrowly at trespass" which would not intrude upon the federal scheme did not empower it to take the whole controversy in hand. So here, the state's authority over the membership segment of the dispute does not authorize it to engulf the whole controversy.

The jurisdiction of the National Labor Relations Board is exclusive, even where the practical consequence is that the federal agency will not act and the state agency cannot act. *Guss v. Utah Labor Relations Board*, 353 U.S. 1. *A fortiori* the Board's jurisdiction is exclusive here. For the state court's authority to safeguard membership rights is not impaired by the exclusive authority of the Board to make an employee whole for loss caused by discrimination in employment. The state court can still enter an effective judgment restoring the individual to his membership rights within the union. Furthermore, since state action redressing discrimination in employment is plainly excluded in the absence of restoration to union membership, damages can only be awarded by a state court after it first finds that the individual has been wrongfully expelled from the union. But a finding of wrongful expulsion from union membership is an irrelevancy under the federal scheme. For whether expulsion is proper or improper, the Act provides that in neither event can it be made the basis of loss of employment. The upshot is that to exclude the state from the field of discrimination in employment is necessary to the effective functioning of the federal scheme and does

not impair its interest within the field of internal union membership. Both the state and federal interests are preserved within their proper orbits without conflict.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment should be reversed.

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APPENDIX A

The Relevant Part of the February 16, 1956, Opinion of the California District Court of Appeal is as follows:

4. DAMAGES: JURISDICTION.

The Taft-Hartley Act prescribes in part: "(b) It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: PROVIDED, *That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . .*" (29 U.S.C. § 158, emphasis added.) In construing this section the courts have held that the courts have jurisdiction to restore union membership to a member improperly deprived thereof by his union. As said in *Mahoney v. Sailors' Union of the Pacific* (Wash., 1954), 275 P. 2d 440, improper expulsion by the union does not constitute an "unfair labor practice" which under the act takes jurisdiction away from the courts. (See also *Real v. Curran*, 138 N.Y.S. 2d 809.) But a different situation results when the member seeks damages as a result of such expulsion. The courts hold that the act authorizes the Labor Relations Board to compensate the member for loss of earnings if lost through "the procedures followed by the union whereby employers were caused to discriminate against" such members (*idem*, p. 444); such procedures constitute an unfair labor practice. There are many cases holding it to be an unfair labor practice for the union in any way to cause an employer to fail to employ the discharged member. Among others are *Born v. Laube*, 213 F. 2d 407, cert. den. Oct. 18, 1954, 348 U.S. 855; *Radio Officers' Union, etc. v. National L. R. Bd.*, 347 U.S. 17, 74 S. Ct. 323; *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 75 S. Ct. 480. There are three cases, almost identical in this respect with the one at bar, in which the union after improperly expelling the member, took no active steps to notify the employer not to employ him, but, as

here, merely refused to issue the employee a hiring hall card or to dispatch him to the job. In each of those cases it was held that such action constituted an "attempt to cause an employer . . . to discriminate against" the employee (29 U.S.C. § 158), and therefore was an unfair labor practice as to which Congress had given the Labor Relations Board exclusive jurisdiction. (*Mahoney v. Sailors' Union of the Pacific*, supra, 275 P. 2d 440; *Sterling v. Local 438*, etc., (Md., 1955) 113 A. 2d 389; *Real v. Curran*, supra, 138 N.Y.S. 2d 809.) In the latter case the court said (p. 812): "If the union caused or attempted to cause plaintiff's discharge from his existing employment with the United States Lines, as is alleged—*either by hiring procedures*, or by causing union members not to work with him—it has committed an unfair labor practice within the contemplation of the section, and the National Labor Relations Board can direct the union to cease and desist from such conduct." (Emphasis added.)

As said in *Real v. Curran*, supra, 138 N.Y.S. 2d 809, 813-814, the illegal expulsion of a member from the union does not constitute an unfair labor practice as such and therefore "the Board cannot restore plaintiff's union membership because its power to direct affirmative action is dependent upon its finding of an unfair labor practice. . . . It is the causing or attempting to cause the employer to discriminate against an employee . . . that brings the Board's power into play . . . It is, therefore, concluded that the provisions of the Labor Management Relations Act, 1947, do not exclude the State courts from their traditional jurisdiction to restore to membership a wrongfully expelled member of the union."

Because the withholding from petitioner of the required card to obtain employment and the refusal of the union's dispatcher to send petitioner out on a job constituted unfair labor practices, and consequently the exclusive jurisdiction of the damages issue is in the Labor Relations Board, we are forced to hold that the award of damages

by the trial court was beyond the jurisdiction of the court and must be reversed.

Those portions of the judgment awarding petitioner damages are reversed. In all other respects the judgment is affirmed. Petitioner will recover costs.

APPENDIX B

The Relevant Part of the June 12, 1956, Opinion of the California District Court of Appeal is as follows:

4. DAMAGES: (a) *Jurisdiction.*

In determining the question of whether the exclusive jurisdiction to grant damages in a case of this kind lies in the Labor Relations Board, it is first necessary to determine the character of the pleadings and issues in this case. The petition alleged a breach of contract between the union and plaintiff, one of its members.* It took the form of a petition for writ of mandate because damages alone would not be adequate to restore to petitioner the things of value he had lost by reason of the breach. No charge of "unfair labor practices" appears in the petition. The answer to the petition denied its allegations and challenged the jurisdiction of the court, but said nothing about unfair labor practices. The evidence adduced at the trial showed that plaintiff, because of his loss of membership, was unable to obtain employment and was thereby damaged. However, this damage was not charged nor treated as the result of an unfair labor practice but as a result of the breach of contract. Thus the question of unfair labor practice was not raised nor was any finding on the subject requested of, or made by, the court.

So far as plaintiff's improper expulsion from the union is concerned, there could be no question of unfair labor practice.

* See *Harris v. Nat. Union etc. Cooks & Stewards*, *supra*, 98 Cal. App. 2d at p. 736: "The constitution of the union constitutes a contract with the members . . ."

The Taft-Hartley Act prescribes in part: "(b) It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: PROVIDED, *That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . .*" (29 U.S.C.A. § 158; emphasis added.) In construing this section the courts have held that the courts have jurisdiction to restore union membership to a member improperly deprived thereof by his union. As said in *Mahoney v. Sailors' Union of the Pacific*, (1954) 45 Wn. 2d 453 [275 P. 2d 440], improper expulsion by the union does not constitute an "unfair labor practice" which under the act takes jurisdiction away from the courts. (See also *Real v. Curran*, 285 App. Div. 552 [138 N.Y.S. 2d 809].)

So far as the award of damages is concerned, it was awarded not for an unfair labor practice, but for breach of contract and as incidental to the restoration to plaintiff of his right of membership. The contention that the Labor Relations Board has sole jurisdiction of the question of damages in a case of this kind was made and answered in *Taylor v. Marine Cooks & Stewards Assn.*, 117 Cal. App. 2d 556, 564: "Appellants argue that these disputes are solely cognizable by the National Labor Relations Board under the Taft-Hartley Act. (29 U.S.C.A. § 158 (b) 2.) The damages suffered by respondents were an incident of the wrongful act of appellant union in taking disciplinary action against them in a manner which was violative of their rights under the constitution of the union. Nowhere in the Taft-Hartley Act is the N.L.R.B. given jurisdiction or authority to review the legality of any disciplinary action taken by a union against one of its members or to order a member's reinstatement in the union or to award damages resulting from his wrongful

expulsion. These powers are left in the courts of law where they have always resided. We find nothing in the Taft-Hartley Act to deprive a court of the power to do complete justice between a wrongfully disciplined member and his union by allowing such damages as he may have suffered as an incident to the judgment restoring him to the rights within the union of which he had been illegally deprived."

There are many cases holding it to be an unfair labor practice for a union in any way to cause an employer to fail to employ an expelled member (whether the expulsion be proper or improper), and that the National Labor Relations Act authorizes the Labor Relations Board to compensate the member for loss of earnings if lost through the procedures followed by the union whereby employers were caused to discriminate against such members. (*Real v. Curran*, supra, 138 N.Y.S. 2d 809.)* But in all those cases the charge was made that the acts of the union constituted unfair labor practices and such charge was an issue in each case. As we have pointed out it was not an issue here. In *Weber v. Anheuser-Busch, Inc.*, supra, 348 U.S. 468, where the issue was whether the unions were guilty of unfair labor practices the court must have had this very distinction in mind for after referring to the "delicate problem of the interplay between state and federal jurisdiction touching labor relations" (p. 474) and after stating (p. 480) "the Labor Management Relations Act 'leaves much to the states, though Congress has refrained from telling us how much'" (quoting from *Garner v. Teamsters Union*, 346 U.S. 485, 488) it prefaced its conclusion that the state court did

* Among other cases are: *Born v. Laube*, 213 F. 2d 407, cert. den. Oct. 18, 1954, 348 U.S. 855; *Radio Officers v. Labor Board*, 347 U.S. 17; *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468; *Mahoney v. Sailors Union of the Pacific*, supra, 275 P. 2d 440; *Sterling v. Local 438*, etc. (Md., 1955) 113 A. 2d 389.

not have jurisdiction of the unfair labor practices charged, as follows: “ . . . *where the moving party itself alleges unfair labor practices . . .*” P. 481; emphasis added.) In *United Workers v. Laburnum Corp.*, 347 U.S. 656, the court held that the National Labor Relations Act did not give such exclusive jurisdiction to the National Labor Relations Board as to deprive a Virginia state court of jurisdiction to try a common law tort action brought by a construction company against a union even though the United States Supreme Court assumed the conduct constituted an unfair labor practice under the act.*

In *Real v. Curran*, supra, 138 N.Y.S. 2d 809, where a member allegedly was illegally expelled from his union, the court held that the Labor Relations Board could only act where there was an unfair labor practice, that improperly expelling the member did not constitute such practice and hence the board had no power to restore his union membership. Therefore it held that there was nothing in the Labor Relations Act which would affect the law which had long existed in New York that a wrongfully expelled member of a labor union was entitled to restoration by the state courts to union membership and “in a proper case, damages for consequent loss of wages.” (P. 811.) “It is, therefore, concluded that the provisions of the Labor Management Relations Act, 1947, do not exclude the State courts from their traditional jurisdiction to restore to membership a wrongfully expelled member of the union.” (P. 814.)

In *International Union, etc. v. Hinz*, 218 F. 2d 664 (U.S. Ct. of Appeals, 6th Cir., 1955) the plaintiff sued the union in the state court of Michigan for damages (not for reinstatement in the union) charging that his union membership had been wrongfully terminated, and asking

* It is significant that there, as here, the trial court made no finding that the acts in question did constitute unfair labor practices.

both compensatory and exemplary damages for loss of wages, etc. The union filed a complaint in the U.S. District Court praying for an injunction against the prosecution of said suit in the state court. In upholding the action of the District Court in dismissing this complaint, the reviewing court held: "Appellee's work did not cease as a consequence of a current labor dispute nor because of an unfair labor practice." (P. 665.) "The Board has no jurisdiction in disputes between a union and its members nor authority over the internal operation of a union." (P. 665. See also *Amalgamated Clothing Workers of America v. Richmond Bros. Co.* (6 Cir.) 211 F. 2d 449, and *International Union of Electrical, Radio and Machine Workers, C.I.O. v. Underwood Corp.*, 219 F. 2d 100.)

In *Holderby v. International Union etc. Engrs.*, supra, 45 Cal. 2d 843, the plaintiff filed an action in which he sought and obtained reinstatement as a member in good standing in the union and damages resulting from his alleged unlawful exclusion therefrom. While the Supreme Court reversed the judgment on the ground of the plaintiff's failure to exhaust his administrative remedy, it is interesting to note that the court nowhere intimates that it did not have jurisdiction of the subject matter of the action. Likewise in *Weber v. Marine Cooks' & Stewards' Assn.*, 123 Cal. App. 2d 328, the plaintiff sued for reinstatement in his union after an alleged wrongful expulsion and for damages in the loss of wages and for mental suffering (just as plaintiff did here). The trial court granted a motion for nonsuit on the ground of laches alone. The reviewing court reversed the judgment and sent the case back for trial. It evidently had no doubt concerning its jurisdiction.

The language of William J. Isaacson in his article, "Labor Relations Law: Federal versus State Jurisdiction," appearing in the May, 1956, *American Bar*

Association Journal (vol. 42, No. 5, p. 415) is applicable here. After calling attention to the fact that there is a conflict between the courts, both state and federal, which have considered the question here involved, and that the United States Supreme Court has not passed upon it, and then referring to *Real v. Curran*, supra, 138 N.Y.S. 2d 809, and *Mahoney v. Sailors' Union of the Pacific*, supra, 275 P. 2d 440, the article then states (p. 483): "Although even these state court decisions may lead to possible conflict between the federal labor board and state courts they do not present potentialities of conflicts in kind or degree which require a hands off directive to the states. A state court decision requiring restoration of membership requires consideration of and judgment upon matters wholly outside the scope of the National Labor Relations Board's determination with reference to employer discrimination after union ouster from membership. The state court proceedings deal with arbitrariness and misconduct vis-a-vis the individual union members and the union; the Board proceeding, looking principally to the nexus between union action and employer discrimination, examines the ouster from membership in entirely different terms."

DAMAGES: (b) Award.

Appellants contend that there is no evidence to support the award of \$6800 damages for loss of wages.* Petitioner testified that his earnings were nearly always \$100 per week at least, and frequently between that figure and \$200. At the time of his expulsion from the union he was employed as a marine machinist by the General Electric Company. About four days thereafter he was injured on the job, incapacitated approximately three weeks. The ordinary practice was for employers to telephone the union hall for men, and the union members

*They apparently do not claim the evidence is insufficient to support the award of \$2500 for mental distress.

would be dispatched to the work. Thereafter he applied to the union for an assignment to a job as he had done prior thereto. He was refused dispatch by the union dispatcher. He testified he sought work directly from the employers but without success. Although there was some testimony to the effect that the union might dispatch a nonmember to a job if he had a letter from the employer requesting him, the dispatcher testified that plaintiff would not have been dispatched even if he had such letter. There was ample evidence to support the award.

The judgment is affirmed.

APPENDIX C

The Relevant Provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 141, et seq.) are as follows:

SECTION 1.

(b)

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

SEC. 2.

“(6) The term ‘commerce’ means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any

Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

“(7) The term ‘affecting commerce’ means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

“(8) The term ‘unfair labor practice’ means any unfair labor practice listed in section 8.

* * * * *

“RIGHTS OF EMPLOYEES

“SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

“UNFAIR LABOR PRACTICES

“SEC. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

“(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this

Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; [and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement:] *and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 9 (f), (g), (h), and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement:* *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly re-

quired as a condition of acquiring or retaining membership;

“(b) It shall be an unfair labor practice for a labor organization or its agents—

“(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

“(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

“PREVENTION OF UNFAIR LABOR PRACTICES

“SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even

though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

“(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the

district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

“(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice, may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him

of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

• • • • •

“(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1957

No. 31

INTERNATIONAL ASSOCIATION OF MACHINISTS, ET AL.,
Petitioners

v.

MARCOS GONZALES, *Respondent*

On Writ of Certiorari to the California District Court of Appeal

REPLY BRIEF FOR PETITIONERS

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STATUTE:

The National Labor Relations Act, as amended:

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Section 8(b)(1)(A)	7, 9, 12, 13
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Nineteenth Annual Report of the National Labor Relations Board, p. 103 (1954)	9

IN THE
Supreme Court of the United States

OCTOBER TERM, 1957

No. 31

INTERNATIONAL ASSOCIATION OF MACHINISTS, ET AL.,
Petitioners

v.

MARCOS GONZALES, *Respondent*

On Writ of Certiorari to the California District Court of Appeal

REPLY BRIEF FOR PETITIONERS

- I. LOSS OF EMPLOYMENT RESULTING FROM A UNION'S DISCRIMINATORY REFUSAL TO REFER AN EMPLOYEE TO WORK OR TO CLEAR HIM FOR WORK MAY REASONABLY BE DEEMED TO BE WITHIN THE REGULATORY POWER OF THE NATIONAL LABOR RELATIONS BOARD AND HENCE WITHIN ITS EXCLUSIVE JURISDICTION

Respondent supports the jurisdiction of the state court upon the ground that there is no unfair labor practice in this case (Res. br. pp. 2, 7, 9). He maintains, as he must, that petitioners refused to dispatch him for work from the union hall because of his expulsion from membership, and that as a result he was un-

able to obtain employment in his trade (Res. br. pp. 5-6, 10, 11). He nevertheless contends that petitioners did not thereby violate Section 8(b) (2) of the National Labor Relations Act which makes it an unfair labor practice for a labor organization or its agents "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) . . .". This contention is apparently based upon the view that on the record there is no evidence that the refusal of employers to hire respondent was brought about by specific requests directed by petitioners to these employers but resulted solely from petitioners' unassisted act of declining to dispatch respondent for work; accordingly, so the argument seems to run, the refusal of employers to hire respondent was not "caused" by petitioners (Res. br. pp. 10, 11, 14, 16, 25).

We stated in our opening brief, and we do not believe it can seriously be questioned, that the money judgment entered by the state court was awarded to redress conduct which "is a common unfair labor practice condemned by the National Labor Relations Act" (Pet. br. p. 10). Since respondent does dispute the existence of an unfair labor practice, it is desirable to be precise concerning the showing which is necessary to establish the exclusive jurisdiction of the National Labor Relations Board. It is enough that the conduct in controversy may reasonably be deemed to be within either the prohibition or the protection of the Act in order to require that "the state court must decline jurisdiction in deference to the tribunal which Congress has selected for determining such issues in the first instance." *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 478-479, 480, 481; see also, *Local 25, Teamsters*

Union v. N.Y., N.H. & H. R.R., 350 U.S. 155, 161; *Retail Clerks International Ass'n. v. J.J. Newberry Co.*, 352 U.S. 987; *District Lodge 34, International Association of Machinists v. L. P. Cavett Co.*, October Term 1957, No. 453, decided November 12, 1957. Once it reasonably appears that the controversy is within the class that the Board is empowered to determine, the exclusiveness of the Board's jurisdiction of course does not turn upon the manner in which on a particular record the Board would decide the merits of the dispute. Whether there is sufficient or insufficient evidence to establish the elements of a violation is not material to the jurisdiction of the Board as the sole tribunal to make the determination either way. *Graybar Electric Co. v. Automotive Union*, 365 Mo. 753, 287 S.W. 2d 794, 801-803. Jurisdiction which is exclusive to sustain a claim must be equally so to dismiss a claim. The "power to decide a matter can hardly be made dependent on the way it is decided." *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 775.

We now show that loss of employment resulting from a union's refusal to refer or to clear an employee for work because of his expulsion from membership may reasonably be deemed to be within the regulatory power of the Board and hence within its exclusive jurisdiction.

1. The evidence of record shows as follows:

The money judgment covered respondent's loss of employment for the period from March 1952, when he was expelled from union membership, to June 1953, when illness incapacitated him from engaging in any employment (R. 21). In August 1952, five months

after respondent's expulsion from membership, a collective bargaining agreement went into effect entitled "Pacific Coast Master Agreement for Marine Machinists Between Pacific Coast Shipbuilders and International Association of Machinists" and enumerated local lodges (R. 73). Section 2 of that agreement, pertaining to "Union Security and Hiring of Men," provided that (R. 74, Pet. ex. 8):¹

(a) Union Shop: The Employer and the Union agree that membership in the Union shall be required as a condition of employment on and after the 30th day of employment or on and after 30 days following the execution of the Agreement, whichever comes later.

(b) Hiring of Men: The Employer agrees to advise the Union of all job openings in the classifications of work set forth in the certification by the NLRB in Case No. 20-RC-1275 so that the Union may refer qualified men to the Employer for consideration for employment.

(c) The Employer agrees to refer all newly hired and rehired employees within the classifications covered by this Agreement, to the Union and the Union agrees to issue clearances.

(d) The Union agrees that it will upon request of the Employer furnish qualified men when available to the Employer for the classifications covered by this Agreement.

(e) The Employer agrees to discharge or terminate the employment of any person who fails to qualify under paragraph (a) above within twenty-four (24) hours when requested to do so by the Union in writing.

¹ The agreement is part of the record before this Court but has not been included in the printed record.

(f) The Union agrees that all employees hired under this Agreement shall be willing to, and shall submit to the making of such records as are, or may be required by the Employer for the purpose of identification and for security.

(g) The Employer may refuse to employ any person or may discharge any employee for any just and sufficient cause.

While the agreement went into effect in August 1952, the actual practice pertaining to the hire of marine machinists in the San Francisco area was the same before and after the effective date of that agreement (R. 73). By that practice, "as a rule," employers requiring marine machinists would telephone the union hall to inform the dispatcher of the number of men needed, and the dispatcher would refer the required number to the employer (R. 93, 57). The men at the union hall would be the first cleared for work (R. 93). To fill the jobs still remaining after the men present at the hall had been assigned, the dispatcher would consult the "out of work" cards of the men registered for employment at the hall and he would "automatically start to call the ones that are registered" (R. 93-94).

No "out of work" card is recorded for a marine machinist who is not a member of the Union (R. 94). Furthermore, a nonmember is dispatched for work from the union hall "Only in cases of where we couldn't supply them from the union membership" (R. 99). If a man "secures a job for himself," rather than by referral from the union hall, he obtains a letter from the employer requesting his assignment to the job, and upon the man's presentation of that letter to the dispatcher at the union hall, "he is automatically

cleared to the job, to go to work. Now if a man doesn't come in with a letter, he isn't cleared, that is for sure" (R. 98). However, a nonmember who presents a written request from an employer is apparently cleared only if no union personnel are available for work (R. 99).

For the twelve years preceding his expulsion from union membership, during which respondent had been working as a marine machinist in San Francisco, he had obtained employment through the union hall (R. 38). However, as the dispatcher testified, after respondent "was expelled and naturally coming up as an expelled member, he wouldn't be entitled to work" (R. 96). As respondent testified, he "applied regularly" for work at the union hall after expulsion but the dispatcher told him "he couldn't dispatch me on account of the trouble I had with the organization"; "he told me his hands were tied" (R. 57, 101-102). Respondent applied directly to employers of marine machinists for work but without success (R. 58). Had respondent secured a letter from an employer requesting his assignment to a job, the dispatcher would not have cleared him (R. 98).

2. Upon the evidence of record the conduct is unquestionably within the regulatory ambit of the National Labor Relations Board:

(a) The conduct here is well within the scope of the Board's decision in *International Union of Operating Engineers, Local No. 12*, 113 NLRB 655. There, under a dispatch system operated by a union, one Holderby had been regularly referred to work until his expulsion from union membership; thereafter the union refused to send him out on a job. *Id.* at 660. Describing the

theory of the complaint, the Board stated that the "General Counsel contends that, after expelling Robert Holderby from membership, the . . . [union] denied him further job referrals in violation of Section 8(b) (2) and (1)(A) of the Act," and that "the mere removal of Holderby's name from the contractual preferred list because he had lost his union membership was a violation of the Act" *Id.* at 662. The Board ruled that (*id.* at 663):

We agree with the General Counsel. It is clear that, for the purposes of job referral, Local 12 refused to consider Holderby on an equal basis with individuals who were entitled to preference under the AGC agreement, simply because he was no longer a member of Local 12. "This denial of equal access to the available jobs was in itself and without more a restrictive imposition in violation of the Act." [*N.L.R.B. v. Local 803, International Brotherhood of Boilermakers*, 218 F.2d 299, 303 (C.A. 3), enforcing 107 NLRB 1011.]

* * *

We . . . find that by removing Holderby's name from the "Members" list because of his expulsion from the Union, thereby denying him equal access to jobs, the . . . [union] . . . violated Section 8(b) (2) and (1) (A) of the Act.

Among other relief, the Board ordered the union to "Make whole Robert A. Holderby for any loss of pay he may have suffered as a result of the discrimination against him" *Id.* at 655. The Court of Appeals for the Ninth Circuit enforced this part of the Board's order. *N.L.R.B. v. International Union of Operating Engineers, Local No. 12*, 237 F.2d 670, 674, cert. denied, 353 U.S. 910.²

² Other parts of the Board's order were set aside for want of substantial support in the evidence.

Interestingly enough, Holderby had instituted suit in the state court of California to secure restoration to union membership. His action was dismissed upon the ground that he had failed to exhaust his internal union remedies and for that reason invocation of judicial intervention was premature. *Holderby v. International Union of Operating Engineers, Local Union No. 12*, 45 Cal. 2d 843, 291 P.2d 463. On respondent's theory, had the state court found in Holderby's favor and ordered his restoration to union membership it could as an incident to that judgment also order that he be made whole for the loss of wages he sustained as a result of the denial of employment to him based on his expulsion from union membership. There would thus be two tribunals, the state court and the federal agency, with jurisdiction to enter make whole orders based upon discriminatory loss of employment. "If the two . . . attempt to exercise a concurrent jurisdiction . . . , action by one necessarily denies the discretion of the other. The second to act either must follow the first, which would make its action useless and vain, or depart from it, which would produce a mischievous conflict." *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 776. "These are the very real potentials of conflict which lead us to allow supremacy to the federal scheme" *La Crosse Telephone Corp. v. W.E.R.B.*, 336 U.S. 18, 26.

(b) The hiring procedure spelled out by the collective bargaining agreement is valid on its face. It is lawful to establish by contract that a union shall refer employees for work, and shall clear employees for work who have obtained jobs by direct application to the employer, so long as referral and clearance are

conducted by the union upon a nondiscriminatory basis.³

While "a referral system is not *per se* invalid," it constitutes a violation of Section 8(b) (1) (A) and (2) "if the union applies it discriminatorily." *N.L.R.B. v. Philadelphia Iron Works, Inc.*, 211 F.2d 937, 943 (C.A. 3). On the evidence of record that is the situation here. The state court found that "employers of the type of labor provided by members of this organization only hire through the union hiring hall" (R. 123). Petitioners generally operated the referral and clearance system of hiring so as to prefer members. And they specifically applied the system to cut off respondent's access to employment because of his expulsion from membership.

A union is responsible under Section 8(b) (2) of the Act for loss of employment which results from its discriminatory administration of the hiring function which it exercises pursuant to a referral and clearance system. The Board holds "that by being a party to a hiring arrangement which contemplates discrimination against nonunion employees a union becomes liable for any discrimination pursuant to the arrangement."⁴ "And if an employer rejects workers who, for discriminatory reasons, have not been cleared or

³ *Hunkin—Conkey Construction Co.*, 95 NLRB 433, 435, and cases cited at note 4; *N.L.R.B. v. Swinerton & Walberg Co.*, 202 F. 2d 511, 514 (C.A. 9), cert. denied, 346 U.S. 814; *Eichleay Corp. v. N.L.R.B.*, 206 F. 2d 799, 803 (C.A. 3); *Del E. Webb Construction Co. v. N.L.R.B.*, 196 F. 2d 841, 845 (C.A. 8); *N.L.R.B. v. F. H. McGraw and Co.*, 206 F. 2d 635, 641 (C.A. 6).

⁴ *N.L.R.B.*, Nineteenth Annual Report, p. 103 (1954); *Great Atlantic and Pacific Tea Co.*, 117 NLRB 1542, 1545; *Permanente Steamship Corp.*, 107 NLRB 1111, 1113.

given work permits by the union as required under the agreement, the union will be held to have violated section 8(b) (2) even though it did not specifically request the employer to deny them employment."⁵

Accordingly, contrary to respondent's apparent contention, where a union is a party to an employment system by which the employer hires upon referral or clearance by the union, the union's liability under Section 8(b) (2) is complete upon a showing of a discriminatory refusal to refer or clear without a further showing that the union has specifically requested the employer to do that which under the hiring system the employer is obligated to do.

(c) Upon respondent's own showing, it would be fictive to say that the employers' refusal to hire respondent was not actively caused by petitioners, and in acquiescence with their understood wish, even in the absence of a specific request by petitioners not to employ him. Respondent's petition for writ of mandate alleged that as a union member he had "the right to work . . . under collective bargaining agreements with employers . . ." (R. 2). Respondent's counsel in his opening statement to the trial court stated that (R. 36):

Since March of 1952 [after his expulsion from union membership], however, the Plaintiff has been unable to obtain any work because everytime he applies for a job, he is told to go to the hall to get a clearance, and when he goes to the Local Lodge hall he is told that no clearance can be given

⁵ N.L.R.B., Seventeenth Annual Report, p. 186 (1952); *International Union of Operating Engineers, Local No. 12*, 113 NLRB 655, 663, enforced as modified, 237 F. 2d 670, 674 (C.A. 9), cert. denied 353 U.S. 910; *Mundet Cork Corp.*, 96 NLRB 1143, 1149-50; *Utah Construction Co.*, 95 NLRB 196, 206-207.

until he pays the fine and apologizes . . . and is reinstated as a member. . . .

In response to questions by his own counsel, respondent testified that when he applied for work directly to employers, "Lot of times they did need a man, but they told me they couldn't employ me, they didn't want no picket line there (Tr. 36); on one occasion, a prospective employer asked respondent "how I was with the union, and I told him the truth, that I . . . just was out, I was expelled. He said he was sorry, he couldn't do nothing" (Tr. 37).⁶ While these answers were stricken as hearsay (*ibid.*), it is patent that the jurisdiction of the Board cannot vary with the admissibility of the evidence marshalled in support of a claim.

Furthermore, upon advice of his own counsel, respondent filed an unfair labor practice charge with the Board (R. 67). According to respondent, he withdrew that charge because he was reluctant to implicate the local lodge in a proceeding before the Board (R. 68). And the court below, both in its initial decision (Pet. br. pp. 1a-2a) and in its decision on rehearing (Pet. br. p. 5a), recognized that petitioners' conduct constituted an unfair labor practice. It sought to justify the exertion of jurisdiction by the state court upon the ground, not that the conduct did not constitute an unfair labor practice, but that it was litigated under the rubric of a breach of contract (R. 127, 128-129). As we stated in our opening brief, however, "It is the conduct which the state court presumes to regulate, not the label which it chooses to affix to it, that is decisive" (p. 14). Mischievous diversity is no less be-

⁶ "Tr." refers to the typewritten transcript of record on file with this Court which has not been included in the printed record.

cause the identical conduct taken in hand is called by a different name. See *District Lodge 34, International Association of Machinists v. L. P. Cavett Co.*, October Term 1957, No. 453, decided November 12, 1957, where respondent contended that the state court had jurisdiction because of an alleged breach of contract.

(d) Quite apart from Section 8(b) (2) of the Act, petitioners' conduct may reasonably be deemed to be within the independent reach of Section 8(b) (1) (A) of the Act.

Section 8(b) (1) (A) forbids a union "to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7" Section 7 states that employees shall have the right to "assist labor organizations", but it also confers the converse right to "refrain from any or all of such activities" except as limited by a valid union security agreement. While a valid union security agreement exists here, it may be lawfully invoked to cause the discharge of an employee only for the reason that he is delinquent in the payment of periodic dues or initiation fees (*Radio Officers' Union v. National Labor Relations Board*, 347 U.S. 17, 40-42), a reason not involved in this case.

As the penalty for falsely accusing a union officer of having assaulted him or having instigated an assault upon him, respondent was required by petitioners to pay a fine and to make an apology. Respondent refused to comply and for that reason was expelled from union membership and denied access to employment. To comply with a penalty imposed by a labor organization is clearly to assist it. To refuse to comply is just as clearly to refrain from assisting it. See *National Labor Relations Board v. George W. Reed*, 206 F.2d 184, 189

(C.A. 9); *National Labor Relations Board v. Philadelphia Iron Works, Inc.*, 211 F.2d 937, 944 (C.A. 3). That abstention is protected from restraint and coercion. To deny an employee access to employment because of that abstention is to restrain or coerce him within the meaning of Section 8(b) (1) (A):

(e) Should it be thought that petitioners' conduct may not reasonably be deemed within the reach of Sections 8(b) (1) (A) or 8(b) (2) of the Act, then it must reasonably be deemed to be conduct which the Act contemplates that a labor organization is free to engage in. Congress has legislated comprehensively upon the subject of discrimination in employment (*Radio Officers' Union v. National Labor Relations Board*, 347 U.S. 17), and except for authorizing a state to prohibit an agreement requiring membership in a labor organization as a condition of employment (section 14 (b); *Algoma Plywood & Veneer Co. v. W.E.R.B.*, 336 U.S. 301), it has occupied the field. Conduct which is allowable within this field is just as much a part of the federal scheme as conduct which is prohibited. It is implicit in the Act that conduct which is not forbidden is within the permissible range of activity. *Garner v. Teamsters Union*, 346 U.S. 485, 499-500. And it is no less an obstruction of federal policy for a state to prohibit what the Act permits as to permit what the Act prohibits. *Ibid*; *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U.S. 62. It follows that if petitioners' conduct is not reached by Sections 8(b) (1) (A) or 8 (b) (2), it may not be reached by the states by local law.

3. The jurisdiction of the National Labor Relations Board is exclusive if it may reasonably be said that the conduct in controversy is comprehended by the

federal scheme. It is patent that petitioners' conduct is within that class. This Court need not and should not decide more.

II. RESPONDENT'S RELIANCE UPON SYRES V. OIL WORKERS INTERNATIONAL UNION, 350 U.S. 892, IS MISPLACED

Respondent's reliance upon this Court's decision in *Syres v. Oil Workers International Union*, 350 U.S. 892, to support the state court's jurisdiction here is misplaced (Res. br. pp. 21-22). Involved in *Syres* is the enforcement of the duty of a statutory bargaining agent to represent all employees within the bargaining unit fairly and without discrimination. Violation of that duty does not constitute an unfair labor practice within the meaning of the National Labor Relations Act, and is therefore outside the regulatory power of the National Labor Relations Board to investigate, prosecute, and redress under that rubric. The Board exercises a limited authority to revoke a certification upon a showing that the statutory agent is in default of its duty of fair representation. *Hughes Tool Co.*, 104 NLRB 318. But that authority is too marginal to warrant the conclusion that it constitutes the sole means for vindication of that obligation.⁷ It is fair to assume that this Court's *per curiam* reversal in *Syres* approves the views expressed in the dissenting

⁷ The inconclusive character of the Board's authority is explored in, and the Court is respectfully referred to, the Board's *amicus* brief in *Ford Motor Co. v. Huffman*, 345 U.S. 330, October Term, 1952, Nos. 193 and 194.

opinion of Judge Rives, and he explained that (223 F. 2d 739, 747):

There are no adequate remedies available to appellants under the National Labor Relations Act or through the Board. The National Labor Relations Act gives the Board power to remedy specific "unfair labor practices" as defined in said Act. Nowhere is the Board given power to prevent discrimination because of race or color, except by very limited procedure which would afford no adequate remedy in this case.

It is suggested that appellants could petition the Board for (1) a separate bargaining unit of their own, or (2) decertification of their bargaining representative. There is, however, no administrative means by which the negro members can secure adequate separate representation for the purposes of collective bargaining. Decertification by the Board would afford no remedy at all.

Since the duty of fair representation is only incidentally and inconclusively within the Board's regulatory power, it is patent that the "statute contemplates resort to the usual judicial remedies of injunction and award of damages when appropriate for breach of that duty." *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 207; see also, *Conley v. Gibson*, October Term 1957, No. 7, decided November 18, 1957. In contrast, in the present case, the Board's authority over the subject matter of discrimination in employment based on union membership and activity or the want of either, and the scope of its remedial power to re-

dress wrongs in that field, are full and complete. Its jurisdiction is therefore exclusive.

Respectfully submitted,

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December, 1957.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1957

No. 31

INTERNATIONAL ASSOCIATION OF MACHINISTS,
an unincorporated association; CHARLES
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Representative thereof; THOMAS E.
McSHANE, and A. C. McGRAW, as Inter-
national Representatives thereof; INTER-
NATIONAL ASSOCIATION OF MACHINISTS,
Local Lodge No. 68, an unincorporated
association; ROBERT ROLLER, as President
of said Local Lodge; REESE CONTE, as
Secretary of said Local Lodge; EDWARD
PICK, as Treasurer of said Local Lodge;
FIRST DOE, SECOND DOE, THIRD DOE,
FOURTH DOE and FIFTH DOE,

Petitioners,

vs.

MARCOS GONZALES,

Respondent.

BRIEF FOR RESPONDENT.

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of said Local Lodge; REESE CONTE, as
Secretary of said Local Lodge; EDWARD
PECK, as Treasurer of said Local Lodge;
FIRST DOE, SECOND DOE, THIRD DOE,
FOURTH DOE and FIFTH DOE,

Petitioners,

vs.

MARCOS GONZALES,

Respondent.

BRIEF FOR RESPONDENT.

OPINIONS BELOW.

The opinion of the California District Court of Appeal, First Appellate District, is reported at 142 C.A. 2d 207, 298 P. 2d 92 (R. 117-132). The Memorandum of Decision of the Superior Court (the trial court) is not reported. It appears at page 16 of the record.

JURISDICTION.

The judgment of the California District Court of Appeal, First Appellate District, was entered on June 12, 1956 (R. 117). A timely petition for hearing was filed in the California Supreme Court and denied on August 8, 1956. A petition for a writ of certiorari was filed on October 31, 1956 and granted on January 14, 1957 (R. 146). 352 U.S. 966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED.

Petitioners assert that they were guilty of an unfair labor practice and base their assertion that they are not liable in damages on the assumption that there was such a practice. Respondent argues that there is no evidence of an unfair labor practice, but a record of a state court sitting in equity dealing with a breach of the contract between an unincorporated association and one of its members. The questions presented depend upon which version of the facts is accepted.

On respondent's version of the facts, the question is:

1. Whether a state equity court is ousted by the National Labor Relations Act of its jurisdiction to afford complete relief to one illegally expelled from membership in an unincorporated association by the fact that (1) the association is a trade union, or (2) the fact that part of the measure of damages under state law is the amount of wages lost by the expelled member.

On petitioners' version, it is:

2. Whether a state court may award damages measured in part by lost wages and in part by mental distress to an ousted member of a trade union, where the trade union has caused employers to discriminate against the ousted member, but where (1) no unfair labor practice is pleaded; (2) no evidence of the unfair labor practice is relevant under applicable state law and none is therefore received; and (3) the court's award does not attempt to regulate conduct which constitutes an unfair labor practice, but only conduct excluded by the federal statute from the jurisdiction of the Labor Board.

STATUTES INVOLVED.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., 141 *et seq.*) are set forth in Appendix A, *infra*.

STATEMENT OF THE CASE.

In 1946, the Grand Lodge of the International Association of Machinists revoked the autonomy of Local Lodge No. 68, a San Francisco local to which the respondent, Marcos Gonzales, belonged. It appointed one Charles Truax as International Representative to control the affairs of the local (R. 39). As a member of the Policy Committee it was respondent's duty to examine the qualifications of candidates for membership in the local lodge and to make recommendations for or against their admission to membership (R. 41). He examined one Kenneth Nelson and recommended that his application be rejected. This recommendation was disregarded on Truax's orders and Nelson was admitted (R. 41-42). Thereafter, Gonzales was physically beaten by Kenneth Nelson (R. 43). Gonzales filed an action charging battery in the Superior Court in San Francisco against Nelson and Truax (R. 23). Gonzales recovered a judgment of \$10,000 against Nelson (R. 23). A judgment of nonsuit was returned in favor of Truax (R. 3).

Thereafter, on June 21, 1950, Truax filed in the local lodge charges that Gonzales had violated the constitution and by-laws of the local and Grand lodges by making false and malicious statements reflecting upon the private and public conduct of Truax as an officer of the Grand Lodge. The claimed "false and malicious statements" were the allegations contained in the complaint for damages mentioned above (R. 23). On July 7, 1950, a purported trial of Gonzales was held by the union. The trial committee reported that Gonzales was

guilty as charged and recommended that he be expelled from both the Grand Lodge and the local lodge (R. 23). The members present at the meeting where this recommendation was made voted 43-31 against the recommendation (R. 23-24).

In violation of the constitution and by-laws of the lodges (R. 26) the local lodge at the next meeting purported to reconsider and rescind the action taken at the previous meeting and then again voted on the recommendation of the trial committee. Although the result did not constitute the two-thirds majority required under the by-laws to sustain a recommendation of expulsion (R. 26) the local lodge ruled that Gonzales had been expelled (R. 50).

Gonzales appealed the purported expulsion to the president of the Grand Lodge in accordance with the rules of the order and the president purported to set aside Gonzales' expulsion but imposed upon him a penalty of \$500 fine and the furnishing of a written apology to Truax (R. 24). This action was illegal under the mandatory provisions of the constitution and by-laws of the lodges (R. 27). The rules of the lodge required compliance with the president's order before any further appeal could be taken. Gonzales refused to comply. The trial court held that his failure to exhaust his remedies within the lodge was excused by the illusory nature of the further appeal (R. 27).

Thereafter Gonzales was unable to obtain dispatch from the union hiring hall (R. 57) although non-union men were regularly dispatched from that hall (R. 97-98). He was also unable to obtain work directly from

employers (R. 58-62). The petitioner objected to evidence about the reason for the refusal of employers to hire respondent, and the court sustained the objection (R. 60-61). Counsel for petitioner stated as its theory that "... there may have been reasons why certain of these employers would not want to employ Mr. Gonzales. I am not stating that they did exist, but for example, in some of the employment that he had, he had the misfortune to become injured. Now, conceivably that would be one of the grounds for refusing him employment. . . ." (R. 61). The union did not give respondent any of the assistance in obtaining employment that he would have been entitled to as a union member. As counsel for petitioner stated it "The crux is concededly, he is being denied the advantages of the union" (R. 97).

Gonzales then filed a charge with the National Labor Relations Board, against the local lodge.¹ The Board did not issue a complaint but advised him to get a lawyer. He did so, and thereafter withdrew the charges (R. 65).

Respondent then filed this action in the Superior Court, seeking a writ of mandate requiring the petitioners to restore him to full membership without the payment of any fine or the statement of any apology to Truax, and for damages suffered by him as the result of his unlawful expulsion from the union (R. 7).

¹Evidence on this point was admitted to show respondent's attitude toward petitioners, and was held irrelevant for any other purpose (R. 68-69).

The petition for writ of mandate did not charge any unfair labor practice (R. 1-7). The answer (R. 11-13) did not allege any unfair labor practice nor raise any question about the jurisdiction of the court. The answer urged that no relief was available to Gonzales in equity because he had a plain, speedy and adequate remedy at law under the provision of § 8 (b)(1) and § 8 (b)(2) of the National Labor Relations Act (R. 13). It denied that respondent had been expelled (R. 11) and pleaded respondent's failure to exhaust his remedies within the lodge (R. 12-13).

At the trial no evidence of an unfair labor practice was offered. The case was tried by both sides on the theory that this was a matter of private contract right. No evidence was offered to show that respondent's former employers were engaged in interstate commerce.

The trial court found that the purported expulsion of respondent was illegal and void, and ordered a judgment against the Grand and local lodges, providing (1) that a writ of mandate should issue requiring Gonzales' reinstatement to membership, and (2) that damages be paid to respondent in the sum of \$6,800 for lost wages and \$2,500 for humiliation, anxiety and degradation (R. 29-30).

SUMMARY OF ARGUMENT.

1. *There is no unfair labor practice in this case.* None is pleaded, no evidence of any such conduct was offered or received, and under state law no such evi-

dence was material or relevant. This case dealt solely with illegal expulsion of respondent from a trade union.

2. *Assuming there was an unfair labor practice in fact though no evidence of it was offered, the state court did not offer to regulate it.* The pleadings raised no question except those properly cognizable under state law. The court could not properly refuse jurisdiction on those pleadings.

The mere presence of an unfair labor practice does not mean exclusive federal jurisdiction. *United Construction Workers v. Laburnum*, 347 U.S. 656. There may be, and there was in this case, an area where state law properly controls. That is the area neither protected nor prohibited by the National Labor Relations Act.

The state court properly determined its jurisdiction without requiring that the Board first determine whether the Board had jurisdiction. None of the indicia of exclusive federal jurisdiction were present. *Weber v. Anheuser-Busch*, 348 U.S. 468.

3. *The state court had jurisdiction to afford complete relief.* No other tribunal had. The law favors the granting of complete relief, and has sanctioned such relief even where partial relief was possible before the National Labor Relations Board. *Syres v. International Oil Workers Union*, 350 U.S. 892.

4. *The decree below does not contravene federal policy in the regulation of labor disputes.* It dealt with illegal expulsion from an association, an area excluded

from the National Labor Relations Act. The fact that it awarded damages does not mean it invaded the Board's jurisdiction. The decision of the California court cannot produce any of the evils which preemption is designed to prevent.

ARGUMENT.

1. THERE IS NO UNFAIR LABOR PRACTICE IN THIS CASE.

The petitioners assume throughout their argument that respondent sought and obtained relief against an unfair labor practice. The assumption is unsupported by the facts. There is first of all no *allegation* in the petition for writ of mandate that any unfair labor practice was committed. Second, there is no *evidence* of any violations of the Act. Third, no such evidence was *relevant* under state law.

A. No unfair labor practice was pleaded.

The petition for writ of mandate in this case was concerned with respondent's illegal expulsion from an unincorporated association. He sought a writ of mandate to compel his reinstatement. Under California law such an expulsion is a breach of the contract between the organization and its members. *Harris v. National Union of Marine Cooks and Stewards*, 98 Cal. App. 2d 733, at 736. The respondent claimed that he had suffered monetary damages, and anxiety and other mental distress, and asked that the court award him appropriate damages for the breach. This was respondent's theory in pleading and also in proving his case.

B. No evidence of unfair labor practices was offered.

Respondent testified that he had been unable to obtain employment since his purported expulsion from the union. His loss as a proximate result of the breach of contract included loss of his right as a union member to be dispatched to work from the union hall (R. 93). He had attempted to obtain employment directly from some of his former employers but these efforts had been unsuccessful (R. 58-62). Neither respondent nor petitioners offered any evidence, however, that employers or union discriminated against Gonzales in violation of the National Labor Relations Act.

Petitioners recognized during the trial of this case that respondent's failure to obtain employment was not the result of illegal discrimination by employers on their own motion or because of coercion by the lodge. When respondent attempted to testify to the statements made by one employer in response to respondent's request for work, the petitioners objected. The following colloquy occurred between Mr. Kennedy, counsel for the petitioners, and the court:

"Mr. Kennedy. That is what I was trying to raise, as a matter here, your Honor, the history will show that there may well have been—and I can't state one way or another—that there may have been reasons why certain of these employers would not want to employ Mr. Gonzales. I am not stating that they did exist, but for example, in some of the employment that he had, he had the misfortune to become injured. Now conceivably that would be one of the grounds for refusing him

employment. What we are doing here, is, we are taking Mr. Gonzales' version of a third party's statement, and the only purpose that they had in not giving him employment; and we don't have that party here, and I think that that is the danger of this type of testimony so far as the Respondents are concerned.

The Court. I think your objection is well taken so far as that is concerned, but I was trying to narrow the issues down. You are making some point of the fact that even if he had been a member, there was no employment available" (R. 61).

There is no evidence in the record that the union caused or attempted to cause employers not to hire respondent. The evidence showed only that the union refused to dispatch the respondent (R. 57). A witness for the petitioners, Mr. O'Hara, the dispatcher, testified that he could not dispatch Gonzales either as a member or as a non-member of the union to any employment (R. 98). Both union and non-union men, however, were dispatched to jobs from the union hall during the period in question here (R. 98-99). As a union member, respondent had a right to be dispatched from the union hall, and on well recognized trade union principles a right to help from the union in obtaining employment. If the employer refused him employment on some ground which the union did not recognize as good cause, it could and should have given him assistance, if he was a member in good standing. Since the petitioners did not regard him as such a member, it gave him no assistance. As counsel for petitioners put it, "The crux is concededly, he is being denied the advantages of the union" (R. 97).

Petitioners now seek to change theories, by an intimation made in the appellate courts that they violated the National Labor Relations Act. Thus they hope to supply ground for an inference that there was an unfair labor practice here. First of all, one may suspect as self-serving a confession made when its only consequence is to save the confessor's pocketbook and deprive the victim of compensation for the confessor's wrongful act. Second, it should be recalled that this Court and all others under our Constitution must decide cases on evidence properly offered and received. Third, since there was no collective bargaining agreement between petitioners and the employers for five months after respondent's illegal expulsion (R. 73), the theory advanced (*by the petitioners*) in the trial court is more substantial than the one now offered to explain the employers' refusal to hire Gonzales.

C. Evidence of unfair labor practices was irrelevant under state law.

Not only was there no evidence offered by petitioners to establish an unfair labor practice, but such evidence would have been excluded as irrelevant under state law. This is illustrated by the trial court's ruling on evidence that respondent filed a charge against the union with the National Labor Relations Board. That evidence was allowed for one purpose only—to show any attitude or disposition Gonzales might have had toward the petitioners that would explain or excuse his ouster. In fact, the colloquy which occurred around this subject illustrates that Court and both counsel were agreed that any unfair labor practice aspect of the facts was immaterial:

Mr. Kennedy. I'd like to offer the copies of the charge of withdrawal [of the charge of an unfair labor practice], and the reason that I am offering them is purely for the convenience of referring later to particular sections, in the event you want to argue. The contents, I believe, is just the formal documents of the charging of the withdrawal, but it contains certain sections of the National Labor Relations Act that I will probably refer to later.

Mr. McMurray. I will object to it on the grounds that it is immaterial, your Honor.

The only way I can see that the question of the Labor Board has any materiality is if the argument is advanced, and I take it that it will be—

The Court. I allowed that questioning on this theory:

To show any bias or prejudice of this witness on cross-examination. I don't think the National Labor Relations Board hearing or the matters alleged have anything to do with this hearing. *It was merely for that reason to show any possible course of conduct that might throw any light upon this man's attitude towards the union.*

If it had been objected to, I would have given the reasons, but I just allowed it as a preliminary question, and you got into it to a certain extent, merely to show bias or prejudice, if any.

Mr. Kennedy. Your Honor, I would like to state, if I may, that the *only purpose of injecting this issue at all is in connection with the argument about the exhaustion of remedies. We don't contend in anyway, what the labor Board did, reflects on the merits or lack of merits of this charge, of Mr. Gonzales' case, and we are not offering it for that purpose at all, but the section does contain*

references to certain sections of the Labor Act which the Court could take judicial notice of, and I thought as a matter of convenience we could have these sections before the Court by having this formal document introduced in evidence.

The Court. Well, if there are any sections in the Labor Relations Act that you think the Court ought to take judicial notice of, just call them to my attention. I have a copy of them (R. 68-69),

Petitioners ask this Court to rule that California is ousted of its jurisdiction to remedy a breach of contract on the basis of an assertion in a brief, without a jot of evidence to support it. They point to no allegation in the petition for writ of mandate or in their answer, of any unfair labor practice. They agreed at the trial that proceedings before the National Labor Relations Board were immaterial to the issues, including the issue of jurisdiction.

2. ASSUMING AN UNFAIR LABOR PRACTICE, THE STATE COURT DID NOT OFFER TO REGULATE IT.

A. The state court could not refuse jurisdiction.

If, on the basis of petitioners' statement, it were to be assumed that petitioners did cause employers to discriminate against him to encourage union membership, there would be an unfair labor practice *in fact*. That is not to say, however, that the state court would then be ousted of jurisdiction. It dealt with an aspect of the fact-complex which was entirely governed by state law and which in no way paralleled or conflicted with the national regulation of labor disputes.

What the state court dealt with here were the rights of the respondent as a member of an unincorporated association. He asserted a cause of action under state law against the petitioners alone, and if he had any cause of action against the employers or the union under federal law, he must be held to have waived it. Does the federal control of labor relations affecting interstate commerce require that he assert it, and that unless he is to go remediless, he pursue the remedy afforded by the National Labor Relations Act? Under the cases decided by this Court, he must do so *only if the conduct regulated by the state court is the same conduct as that regulated by the federal act.*

Thus, in *Garner v. Teamsters Union*, 346 U.S. 485, 498, 499, this Court said, “. . . when two separate remedies are brought to bear on the *same activity*, a conflict is imminent.” (Emphasis added). If the same activity is involved, it matters not that the state may be dealing with private rights, the federal agency with public ones. Except in the narrow field of breach of the peace or danger to the public health or safety, federal occupation of the field of prohibited or protected acts precludes state control. But when the activity regulated by state action is neither protected nor prohibited, the reason for the rule vanishes. *International Union v. Wisconsin Employment Relations Board*, 336 U.S. 245.

In this case the state was concerned with the activity of an unincorporated association in illegally ousting a member. This is a field in which the National

Labor Relations Board is powerless to act, as petitioners concede. Further, the state court did not deal at all with any act of the union which caused employers to discriminate against Gonzales.

In this respect it is quite unlike the cases relied upon by petitioners, where the conduct improperly regulated by the state court was the very conduct, in its entirety, which the Board would deal with. In *Garner v. Teamsters Union*, 346 U. S. 485, *supra*, the conduct dealt with was picketing to cause an employer to discriminate in favor of employees who became union members; in *Plankinton Packing Co. v. Wisconsin Employment Relations Board*, 338 U. S. 953, it was actively designed to coerce the employer into discharging one Stokes, who had resigned from the union; in *Guss v. Utah Labor Relations Board*, 353 U. S. 1, the union pleaded in court the same unfair labor practice it had charged before the Board. In *Weber v. Anheuser-Busch*, 348 U. S. 468, *supra*, the conduct was not wholly unequivocal in character, but it involved a strike and picketing which this Court found reasonably within the unfair labor sections of the Act or reasonably deemed to be within the protection of the Act.

In the case at bar even the petitioners did not find the case suggested exclusive jurisdiction in the Board—it was not until they were appealing from a judgment for damages² against them that this question was raised, to escape payment of damages. At

²They appealed from this part of the judgment only, and took no appeal from the writ of mandate.

the outset they did not plead lack of jurisdiction. They recognized the power of the court to reinstate respondent.

This was true with respect to the question of damages, too—petitioners raised no objection to the pleadings or to the evidence on the question of damages. The parties and the trial court all recognized that there was here a matter which the federal Act did not purport to regulate, even though there was a *possibility* that there was, in addition to the breach of contract, an unfair labor practice.

In this state of the pleadings and the evidence, the state court had no basis for suspecting federal jurisdiction or refusing to exercise its own.

B. The mere presence of an unfair labor practice does not mean exclusive federal jurisdiction.

While it is conceivable that Congress might extend its control of labor relations to all activity which constitutes any part of an unfair labor practice, it has not done so. In *International Union v. Wisconsin Employment Relations Board*, 336 U. S. 245, and in *Algoma Plywood & Veneer v. Wisconsin Employment Relations Board*, 336 U. S. 301, this Court held that state courts may act where the activity regulated, though it involves labor relations and trade unions, was neither protected nor prohibited by the National Labor Relations Act. In *United Construction Workers v. Laburnum Construction Corp.*, 347 U. S. 656, *supra*, the state court was allowed to act even though it was assumed that *an unfair labor practice was the*

very subject for which damages were awarded, because there was no compensatory relief under the federal Act and no federal administrative remedy with which the state remedy conflicted.

Petitioner argues for an extension of federal control which would have effects so far-reaching that it should not be found by implication. Suppose, for example, that an employer illegally discharged an employee for union activity, but explained the discharge by falsely stating to other employees that the man was discharged for stealing. Would that man be prohibited from suing in the state courts for slander?

If an employee attempting to enter a factory during a labor dispute is illegally beaten up by plant guards or pickets, is he prevented by the National Labor Relations Act from suing the employer or the pickets for damages for battery, including wages lost while he was laid up in the hospital?

In these hypothetical cases the state court would be dealing with part of a complex state of facts which includes an unfair labor practice. But the state would deal only with conduct which is not protected nor prohibited by the federal Act, and which is not dealt with by the federal administrative agency in a way that either conflicts with or parallels state action. Slander, in the first example, is not protected by the Act and is not *per se* prohibited. Battery is neither protected nor prohibited. An action for damages in the state court would have no parallel in any administrative remedy under the Act. Any adminis-

trative remedy available in either case would be completely unhampered by the state court actions.

So here, if an unfair labor practice is assumed, there remains an area within the fact-complex which is still governable by state law and which does not invade the area governed by the federal Act.

C. The court properly determined its jurisdiction.

There is a suggestion in *Weber v. Anheuser-Busch*, 348 U.S. 468 and in *Local 25, Brotherhood of Teamsters v. New York, New Haven and Hartford RR*, 350 U.S. 155, that the Board alone may determine whether the conduct in question is protected or prohibited by the Act. That this is not a universal rule is clear from the cases where state courts have been held empowered to make this determination. This is demonstrated, too, by the language of this Court in *Weber v. Anheuser-Busch*, *supra*, where the requirement that the state court initially decline jurisdiction is put upon certain factors: Pleading of an unfair labor practice; a state of facts which "reasonably bring the controversy within the sections prohibiting these practices"; conduct which if not prohibited, may be reasonably deemed to come within the protection of the act.

In this case no unfair labor practice was pleaded by either side, the allegations and evidence were of facts which arose in the illegal expulsion of a union member (over which the Board has no control), and nobody can suppose that the Act protects the deprivation by a union of its members' rights to a fair trial within the organization.

In the absence of any of these indicia of exclusive federal jurisdiction no state court can be required to refuse to hear the litigants who come before it. If the plaintiff does not reveal the factors which mean federal jurisdiction, the defendant certainly can. Where neither side does so, the intelligent and efficient exercise of the states' judicial power requires state courts to adjudicate the rights and liabilities of the litigants under state law.

3. THE STATE COURT HAD JURISDICTION TO AFFORD COMPLETE RELIEF.

It is axiomatic that equity will afford complete relief, including damages where appropriate, to avoid a multiplicity of suits. Petitioners assert that although the court below was the only one which could order respondent's reinstatement in the lodges, he must go to another tribunal to seek damages for lost wages, and his right under state law to damages for humiliation he must forego altogether.

Petitioners and respondents agree that the federal administrative agency cannot award any relief for respondent's wrongful expulsion from the petitioning lodges. Nor is there any disagreement that the Board cannot award damages for humiliation and mental suffering. The petitioners' position then boils down to this: No court can afford complete relief. The Board can grant some relief, the state courts other relief, but no unitary judgment can be had for all the wrong committed.

The policy of equity to award complete relief is ancient and strongly held (see *Oelrichs v. Spain*, 15 Wall. 211, 21 L. Ed. 43, Pomeroy, Equity, 5th Ed., pp. 459-616). It makes obvious sense in the administration of justice. To refuse enforcement of the rule in cases like the one at bar would be to deny the lessons of centuries of experience and volumes of legal history.

Congress has not provided nor this Court held, so far as respondent can discover, that where there is an administrative procedure which will provide a *partial* remedy for a wrong suffered by a worker employed in interstate commerce, and a judicial remedy which will afford *complete* relief, the latter must give way to the former. On the contrary, this Court has recently held, in *Syres v. International Oil Workers Union*, 350 U.S. 892, that the federal courts have jurisdiction to enjoin the enforcement of a discriminatory collective bargaining contract even though its enforcement violated the National Labor Relations Act, and a partial remedy was available under that Act.

In that case the petitioners sought relief from a collective bargaining contract which discriminated against them on the basis of race. When their representatives, certified by the Board, negotiated a discriminatory contract, they sought an injunction against its enforcement, for a declaration that it was void, and for damages. Their argument was that the National Labor Relations Act, like the Railway Labor Act (*Brotherhood of Trainmen v. Howard*, 343 U.S.

768) required labor representatives to bargain with equal fairness for all. (For facts, see same case at 223 Fed. 2d 739). It was argued below (see dissenting opinion of Judge Rives, 223 Fed. 2d at 747) that they could petition the Board for a separate bargaining unit of their own, or for decertification of their bargaining representatives. As Judge Rives points out, these remedies would be wholly inadequate to effect complete relief. The Court of Appeals held that there was no jurisdiction in the federal court because the interpretation of the National Labor Relations Act was not involved. This Court reversed, citing *Steele v. Louisville & N. R. Co.*, 323 U.S. 192; *Tunstall v. Brotherhood*, 323 U.S. 210; and *Brotherhood of Trainmen v. Howard*, 343 U.S. 768, *supra*. The case has been remanded to the District Court for further proceedings.

4. THE STATE COURT'S DECREE DOES NOT CONTRAVENE FEDERAL POLICY.

If it is assumed that there was an unfair labor practice in fact committed by petitioners here, the state court has acted in a field in which the Labor Board could exercise its jurisdiction if it would. If the state court is to be held without jurisdiction to do so, there must be a rationale which requires that rule.

This Court has explained the rationale for the rule where it applies:

“Congress evidently considered that centralized administration of specially designed procedures

was necessary to obtain uniform application of its substantive rules and to avoid those diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." *Garner v. Teamsters Union*, 346 U.S. 485, 490-491, *supra*.

When that rationale is applied to the case at bar, none of the evils it seeks to avoid is found. The primary purpose is to avoid diversities in the application of Congress' substantive rules. But Congress has specifically excepted from the scope of the federal Act the conduct which this decree redresses—expulsion from membership in a trade union. This is clear from the proviso of §8 (b) (1)(A), "this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership." Where state action deals with the area exempted from federal control there can be no conflict between the two jurisdictions.

The decree of the state court is narrowly drawn to deal only with the area of proper state control. It commands petitioners

"... to restore to Marcos Gonzales . . . forthwith, all of his rights and privileges in the said International Association of Machinists and . . . Local Lodge No. 68, and reinstate said petitioner as a member in good standing thereof without payment of any fine or the statement of any apology to . . . Truax or to any other person."

So much, presumably, petitioners would concede. They argue that the state court did more than that here—it also awarded damages, which is within the federal area because the damages redress discrimination in employment. In reply to this it should first be pointed out that under California law as interpreted by its courts, the damages were awarded for petitioners' illegal denial to respondent of those rights which union membership gave to him: Dispatch from the hiring hall, assistance in obtaining employment, relative freedom from economic worry, the right to the prestige which his work in the association had won for Gonzales. The judgment of the court itself makes clear that this is the source of the loss to Gonzales which the court redresses:

“It is further ordered that this Court retains continuing jurisdiction of this cause for the purpose of awarding additional damages or making further orders herein until this judgment and *the said peremptory writ of mandate shall have been fully complied with.*” (R. 30).

The writ of mandate is quoted above—it dealt with restoration to membership and with that alone.

Petitioners argue that no matter what the label the court gave its action, it was awarding damages for discrimination in employment. If so, the ordinary process of appeal in the California courts would surely have sufficed to remedy this, for the record is barren of any evidence to support an award on that basis. Petitioners did in fact argue that there was no evidence to support the award of damages. The California court rejected that argument:

“Appellants contend that there is no evidence to support the award of \$6,800 damages for loss of wages. . . . There was ample evidence to support the award.” (R. 131-132).

Further, petitioners argue that the state court has here seized on the power to award damages, both for wage loss and mental distress, as a handle by which to grapple with the unfair labor practice and evade the preemption of that field by the Federal Government. They read *Amalgamated Meat Cutters v. Fair-lawn Markets, Inc.*, 353 U.S. 20, as holding that the power to enjoin trespassing does not give a state court power to control union conduct in violation of the federal Act. What this Court actually said in that case was that the question of state control of a state matter (trespass) was not before the court, for there the state court had attempted to “reach the union’s conduct in its entirety” (353 U.S. at 20).

Here the state court did not undertake to control any unfair labor practice by petitioner. It did not seek to enjoin any act by the union which “caused or attempted to cause” employers to discriminate. It did not even receive or consider any evidence of such activity.

In *Garner, supra*, this Court pointed out that a variety of procedures applied to federally controlled conduct could result in conflicting adjudications. Petitioners point to the difference between an award of back pay by the Labor Board and an award of damages for lost earnings by the California court. They say this is an example of the conflict. But the differ-

ences speak with at least equal eloquence of the differences between what the Board does when it awards back pay, and what the court was doing here in awarding damages for breach of contract.

The Board, acting to effectuate the purposes of the federal Act, has found that the common-law rule is ineffectual to accomplish that purpose. *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U. S. 344. The court below was acting to remedy a breach of contract. It found the rule adequate for its purpose.

The mere coincidence in part of the measure used by both tribunals—loss of wages—does not obliterate the essential differences between the two awards as to authority to make them, method of calculation, the evidence necessary to support them, the pleadings necessary to make them appropriate, and the conduct they are designed to affect.

Petitioners argue that the award of damages for humiliation does not take the case out of the Act. The fact that the state court awarded damages for mental distress does not, it is true, provide authority to make such an award. Jurisdiction is not based upon the judgment, but the judgment upon jurisdiction. The significance of this part of the judgment below is not that it takes the case out of the federal area, but that it demonstrates that the case was never in that area.

While an unfair labor practice may produce mental distress, such distress has never been considered compensable. The statute empowers the Board to reinstate "with or without back pay", but says noth-

ing about an award of damages for mental distress. The Board is carrying out its administrative function in the area of labor relations. It has found certain remedies effective in so doing. Its primary concern is with labor relations, not remedies.

The court, however, is not seeking to regulate labor relations or prevent unfair labor practices but to award compensation for losses resulting from a breach of contract. Such damages are awarded under its law for breach of the contract between an unincorporated association and its members. *Taylor v. National Union of Marine Cooks and Stewards*, 117 Cal. App. 2d 556. There is no conflict between the Board and the court. If their aim is true, two marksmen shooting at different targets do not hit the same bullseye.

Petitioners beg the question when they suppose (Br. pp. 16-17) a suit by a discriminatorily discharged employee, claiming mental distress, against his employer. They put the case in the area of labor relations, which is the Board's area. Further, they suppose an unfair labor practice as the basis for the suit. A litigant who pleaded his case in this fashion would plead himself right out of court.

It is not respondent who suggests that the power to award damages for mental distress is the power to regulate unfair labor practices. That is a straw man set up by the petitioners. Respondent says that the award of such damages is without probative force in the attempt to show that the court here was trying to enter the federal area.

The question raised by the case at bar is not one of remedies but of conduct. In this case, did the state court, pretending to award damages for breach of contract, in reality attempt to regulate an unfair labor practice?

This question really takes us to the heart of the argument that the state court judgment in this case will bring about incompatible or conflicting adjudications on questions of the substantive rules enacted by Congress. If the state court judgment can be cited to support state court adjudications of unfair labor practices, then petitioners are right. But the state court judgment is clearly based on recognition of the difference between adjudicating an unfair labor practice and adjudicating a breach of contract:

“No charge of ‘unfair labor practices’ appears in the petition. The answer to the petition denied its allegations and challenged the jurisdiction of the court, but said nothing about unfair labor practices. The evidence showed that plaintiff, because of his loss of membership, was unable to obtain employment, and was thereby damaged. However, this damage was not charged nor treated as the result of an unfair labor practice but as the result of the breach of contract. Thus the question of unfair labor practice was not raised nor was any finding on the subject requested of, or made by, the court.” (Opinion below, R. 127).

Thus, this is not one of those cases in which the state court, in the guise of regulating illegal combinations in restraint of trade (as in *Weber v. Anheuser-Busch*, 348 U.S. 468, *supra*) or trespass on

real property (*Amalgamated Meat Cutters v. Fair-lawn Meats*, 353 U.S. 20, *supra*) or some other phase of state power, actually regulated conduct within the exclusive purview of the Board.

CONCLUSION.

Where the state court does not purport to deal with an unfair labor practice; where there is no evidence of an unfair labor practice; where the conduct regulated by the state was left to the states by Congress; where the state decision cannot be taken as authority for any future attempt to regulate an unfair labor practice, the state court decision does not invade the area exclusively reserved to the federal agency. It deals exclusively with illegal expulsion from a trade union.

The decision of the court below should be affirmed.

Dated, San Francisco, California,

October 28, 1957.

Respectfully submitted,

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Of Counsel.

(Appendix A Follows.)

Appendix A

The Relevant Provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 141, et seq.) are as follows:

SECTION 1.

(b)

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

“(b) It shall be an unfair labor practice for a labor organization or its agents—

“(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the pur-

poses of collective bargaining or the adjustment of grievances;

“(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

“PREVENTION OF UNFAIR LABOR PRACTICES

“Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. . . .”

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IN THE
Supreme Court of the United States

October Term, 1957

No. 31

INTERNATIONAL ASSOCIATION OF MACHINISTS, ET AL.,
Petitioners

v.

MARCOS GONZALES, *Respondent*

On Writ of Certiorari to the California District Court of Appeal

PETITION FOR REHEARING

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INTERNATIONAL ASSOCIATION OF MACHINISTS, ET AL.,
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MARCOS GONZALES, *Respondent*

On Writ of Certiorari to the California District Court of Appeal

PETITION FOR REHEARING

Petitioners pray that a rehearing be granted of the decision of May 26, 1958 affirming the judgment in the above-entitled proceeding.

We would not file this petition if we thought we could urge in its support only another look at considerations already advanced. But we believe that the majority opinion shows on its face significant evidence of critical misunderstandings. And so we file this petition in the faith that, if error is disclosed, it will be corrected.

1. The opinion concludes with a quotation from Isaacson, *Labor Relations Law: Federal Versus State Jurisdiction*, 42 A.B.A.J. 415, 483, referring to it as an

apt description of the "important distinction between the purposes of federal and state regulation":

Although even these state court decisions may lead to possible conflict between the federal labor board and state courts they do not present potentialities of conflicts in kind or degree which require a hands off directive to the states. A state court decision requiring restoration of membership requires consideration of and judgment upon matters wholly outside the scope of the National Labor Relations Board's determination with reference to employer discrimination after union ouster from membership. The state court proceedings deal with arbitrariness and misconduct vis-a-vis the individual union members and the union; the Board proceeding, looking principally to the nexus between union action and employer discrimination, examines the ouster from membership in entirely different terms.

It must have come as a shocking surprise to the author to learn that this quotation supported the conclusion reached by the Court. For the views expressed by the author are diametrically opposed to the Court's. Thus, in the paragraph immediately preceding the quotation, the author wrote:

In *Real v. Curran* [285 App. Div. 552, 138 N.Y.S. 2d 809] and *Mahokey v. Sailors Union of Pacific* [45 Wn. 2d 453, 275 P. 2d 440, cert. denied, 349 U.S. 915], the Ninth Circuit decision was distinguished insofar as the union member in those cases also sought a restoration of union membership. In the *Real v. Curran* case, the court concluded that the NLRB was not empowered to restore the individual to union membership and that its powers concerning discrimination related solely to re-employment and back pay for the period of

unemployment resulting from the employer's discrimination brought about at the union's request.

It was to *Real v. Curran* and *Mahoney v. Sailors Union* that the author referred when he wrote that "even *these* state court decisions may lead to possible conflict between the federal labor board and state courts [but] they do not present potentialities of conflicts in kind or degree which require a hands off directive to the states." And these state court decisions hold, as petitioners contend, that the state's power ends with restoring the wrongfully expelled individual to union membership; it does not extend to compensating the employee for loss of earnings based upon denial of employment following expulsion. In the author's view, as in petitioners', respect for this line creates only such risks of conflict as may fairly be dismissed as "remote." But obliteration of the line, it is the author's and petitioners' view, does "present potentialities of conflicts in kind or degree which require a hands off directive to the states."

2. We are not concerned with the Isaacson quotation as infelicitous citation. We are concerned that the Court's mistaken reliance on it reflects a misapprehension basic to the whole of the Court's opinion.

When a state court determines that an individual has been wrongfully expelled and requires his restoration to union membership, neither the claim adjudicated nor the relief granted falls within the province of the National Labor Relations Board. When, in addition, the state court determines whether the individual has been denied employment because of his expulsion and compensates him for loss of earnings, the conduct

and the remedy both "belong . . . to the usual administrative routine' of the Board."¹ The line was clearly drawn in a colloquy between Senators Taft, Ball, and Pepper (93 Cong. Rec. 4274):

Mr. Taft. * * * The union could refuse membership; but if the man were an employee of the company with which the union was dealing, the union could not demand that the company fire him. The union could refuse the man admission to the union, or expel him from the union; but if he were willing to enter the union and pay the same dues as other members of the union, he could not be fired from his job because the union refused to take him.

* * * * *

Mr. Pepper. And the union can admit to membership anyone it wishes to admit, and decline to accept anyone it does not wish to accept.

Mr. Ball. That is correct. But the union cannot, by declining membership for any other reason than nonpayment of dues, thereby deprive the individual concerned of the right to continue in his job. In other words, it cannot force the employer to discharge him.

Protection of employment from impairment because of union membership or the want of it is the very work of the Board. Indeed, the system of hiring found by the state court to exist in this case—referral and clearance for work from a union hiring hall based on membership—is the precise practice which was a significant target of Congress when it amended the Wagner Act to prohibit the closed shop and to permit

¹ *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U.S. 111, 130.

discharge from employment pursuant to a valid union security agreement only for nonpayment of periodic dues and initiation fees. As Senator Taft explained (93 Cong Rec. 3836) :

* * * the bill does abolish the closed shop. Perhaps that is best exemplified by the so-called hiring halls on the west coast, where shipowners cannot employ anyone unless the union sends him to them. That has produced a situation, certainly on the ships going to Alaska, * * * where there is no discipline. A man may be discharged one day and may be hired the next day, either for the same ship or for another ship. Such an arrangement gives the union tremendous power over the employees; furthermore it abolishes a free labor market. A man cannot get a job where he wants to get it. He has to go to the union first; and if the union says that he cannot get in, then he is out of that particular labor field. Under such circumstances there is no freedom of exchange in the labor market, but all labor opportunities are frozen.

The Senate Report stated (S. Rep. No. 105, 80th Cong., 1st Sess., 6) :

It is clear that the closed shop which requires preexisting union membership as a condition of obtaining employment creates too great a barrier to free employment to be longer tolerated. In the maritime industry and to a large extent in the construction industry union hiring halls now provide the only method of securing employment. This not only permits unions holding such monopolies over jobs to exact excessive fees but it deprives management of any real choice of the men it hires. Extension of this principle to licensed deck and

engine officers has created the greatest problems in connection with the safety of American vessels at sea.

While the statute abolished the union hiring hall practice in which dispatch or clearance for work is based on membership, the statute did not prohibit the operation of a union hiring hall upon a nondiscriminatory basis. And so an ever-recurring question before the Board is whether a union is administering its hiring function to prejudice nonmembers or to prefer members. Formulation of standards especially attuned to the resolution of this question, and application of these standards by an agency which brings an expert feel to the situation, is the function of the Board and the very reason for its creation. This is no better illustrated than by the Board's very recent enunciation of minimum standards which must be incorporated in an agreement if the operation of a union hiring hall is to be deemed nondiscriminatory (*Associated General Contractors of America*, 119 NLRB No. 126-A, 41 LRRM 1460, 1462, March 27, 1958):

(1) Selection of applicants for referral to jobs shall be on a non-discriminatory basis and shall not be based on, or in any way affected by, union membership, by-laws, rules, regulations, constitutional provisions, or any other aspect or obligation of union membership, policies, or requirements.

(2) The employer retains the right to reject any job applicant referred by the union.

(3) The parties to the agreement post in places where notices to employees and applicants for employment are customarily posted, all provisions relating to the functioning of the hiring arrange-

ment, including the safeguards that we deem essential to the legality of an exclusive hiring agreement.

And debarment of an employee from access to a hiring hall based on his nonmembership is without more a wrong rectifiable by the Board (*ibid.*):

As an old time member of the Union, and aware of the established hiring hall arrangement, Lewis, of course, went to the Union to apply for work. Had he gone directly to one of the Respondent Employers, he would unquestionably have been rejected summarily and referred to the union hall for clearance, for that is precisely what the contract obligated each employer to do. It matters not, therefore, which of the two parties to the illegal contract he first approached. His unlawful exclusion from employment was a joint act by both Respondents.¹²

¹² As indicated above, even were the particular hiring agreement here involved a lawful one, the Respondent Employers, having delegated hiring authority to the Union, would be *in pari delicto* and equally responsible with the Union for any particularized discrimination, as happened to Lewis here, that the Union perpetrated.

In this case, therefore, the majority opinion is flatly wrong when it sees in the conduct which is the basis for the state court's indemnification for loss of earnings simply "an argumentative coincidence in the facts admissible in the tort action and a plausible proceeding before the National Labor Relations Board . . ." (sl. op. p. 4). A state court's compensation for loss of earnings does not flow from its finding of wrongful expulsion from membership. Wrongful expulsion does not establish loss of earnings. State compensation for loss of earnings depends upon *denial of employ-*

ment based on wrongful expulsion. But denial of employment based on nonmembership is the very point at which the Labor Board intervenes, not argumentatively, but in fulfillment of just that commission with which Congress has entrusted it. The precise duplication in the conduct to which both the state court and the Board look is demonstrated by the findings which are the state court's predicate for compensating for loss of earnings (R. 131-132): "The ordinary practice was for employers to telephone the union hall for men, and the union members would be dispatched to the work. Thereafter [following respondent's expulsion] he applied to the union for an assignment to a job as he had done prior thereto. He was refused dispatch by the union dispatcher. He testified he sought work directly from the employers, but without success. Although there was some testimony to the effect that the union might dispatch a non-member to a job if he had a letter from the employer requesting him, the dispatcher testified that plaintiff would not have been dispatched even if he had such letter."

The short of it is that, for both the state court and the Board, the conduct relevant to compensation for loss of earnings is not expulsion but denial of employment based on expulsion. The state court is empowered to reach the relevant conduct only after first finding a wrongful expulsion; the Labor Board begins with the relevant conduct, because the rightness or wrongness of the expulsion is an irrelevancy under the federal statute. But the conduct relevant to support indemnification for loss of earnings—denial of employment based on nonmembership—is the same for both the state court and the Labor Board. The two tribunals may or may not evaluate this same conduct differently; they

may or may not agree that any loss of employment took place; they may or may not concur that loss of employment is attributable to nonmembership rather than referable to 'permissible reasons. Conflict is as inherent as it was in *Plankinton Packing Co. v. Wisconsin Employment Relations Board*, 338 U.S. 953. There, this Court held that the Wisconsin Board was without power to order an employer to reinstate an employee to his job with back pay, for "the N.L.R.B. was given jurisdiction to enforce the rights of the employees: . . ." *Amalgamated Association v. Wisconsin Employment Relations Board*, 340 U.S. 383, 390, n. 12, explaining *Plankinton*. Since the "potential conflict" in *Plankinton* was not "too contingent, too remotely related to the public interest expressed in the Taft-Hartley Act" (sl. op. p. 5) to preclude the state agency from enforcing the state statute, it cannot be too contingent nor too remote to preclude a state court from enforcing its common law.

3. The Court's opinion, therefore, fails to meet the issue when it dwells upon expulsion from union membership, as if that were the relevant conduct, and does not consider denial of employment based on expulsion, which is the relevant conduct. It equally elides the issue when, in evaluating the remedy available before the Board, it deprecatingly states (sl. op. p. 4): "Although if the unions' conduct constituted an unfair labor practice the Board *might possibly* have been empowered to award back pay, in no event could it mulct for damages for mental or physical suffering" (emphasis supplied).

A correct statement would be, not that the Board "might possibly have been empowered to award back pay," but that it is beyond peradventure certain it

would have awarded back pay. For neither the power nor its exercise is in any doubt. Under the Wagner Act, as against employers, the Board had and exercised the power to order "that workers who had been denied employment be made whole for their loss of pay" (*Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 197), and the Taft-Hartley amendments in terms provided that "back pay may be required of the . . . labor organization . . . responsible for the discrimination suffered" by the employee, thus giving "the board power to remedy union unfair labor practices comparable to the power it possessed to remedy unfair practices by employers" (*Radio Officers' Union v. National Labor Relations Board*, 347 U.S. 17, 54). And the power to require back pay of a labor organization has been routinely exercised whenever the labor organization has been found responsible for discrimination in employment. In the 1957 fiscal year, 222 workers recovered back pay in the amount of \$85,149 from unions,² and in the six fiscal years from 1951 through 1957, 4,224 workers recovered back pay in the amount of \$400,479 from unions.³ It is thus simply incorrect to describe the Board's back pay remedy against unions for discrimination in employment for which they are responsible as a power which "might possibly" exist.

True it is that the Board's back pay remedy is exercised to "effectuate the policies of the Act." Section 10(c). But the "policy of the Act is to make whole

² N.L.R.B., 22nd Annual Report, 164 (1957).

³ The 16th through the 22nd annual reports of the Labor Board at respectively pp. 295, 282, 96, 158, 162, 166, 164.

employees . . . discriminated against." *Radio Officers' Union v. National Labor Relations Board*, 347 U.S. 7, 55. There are relatively infrequent cases where, though an employee has been discriminated against, reinstatement and back pay are withheld because the employee has also engaged in such serious misconduct as to make the grant of relief inconsistent with effectuation of the policies of the Act. *National Labor Relations Board v. Local Union No. 1229, International Brotherhood of Electrical Workers*, 346 U.S. 64, 478, n. 13. Were a state court to compensate an employee for loss of earnings, in circumstances where the Labor Board would withhold back pay because its grant is incompatible with the Act's policies, it would constitute precisely the "conflict in the administration of remedies for the practices proscribed by § 8" which preemption is designed to avoid. *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board*, 336 U.S. 301, 306. To withhold back pay because its award is inconsistent with effectuation of the Act's policies is to withhold it because its grant is incompatible with the national labor policy. For a state court to render the money judgment equivalent of back pay, when the Labor Board would not, is for the state to flout the national labor policy.

This leaves for consideration the Board's lack of power to "mulet for damages for mental or physical suffering" (sl. op. p. 4). Here again the Court's opinion fails to make a differentiation critical to sound valuation. Petitioners do not contest the power of the state court to assess damages for mental or physical suffering attributable to wrongful expulsion; they do contest the power of the state court to assess damages for mental or physical suffering attributable to denial

of employment based on expulsion. For to award damages for mental or physical suffering due to discrimination in employment is to exact reparations in excess of that which Congress has determined suffices for the correction of the wrong. And the vice in this case is that the state court awarded damages for mental distress based, not upon wrongful expulsion, but on discrimination in employment. As we stated in our opening brief (p. 15, n. 8): "It seems clear that the state court's award of \$2,500 damages for mental distress was based upon the distress found to be caused by respondent's discriminatory loss of employment and not for other reasons outside the purview of the National Labor Relations Act. Thus, the District Court of Appeal in its first opinion, when it held that the state court was without power to award damages for discriminatory loss of employment, vacated the whole of the money judgment and did not attempt to allocate any part of it to causes other than loss of employment (*infra*, pp. 2a-3a). And the evidence at the trial shows that the distress claimed by respondent related to his loss of employment (R. 101-103). In any event, assuming *arguendo* that the money judgment for mental distress is allocable partially to reasons other than loss of employment, a remand to the state court is necessary, for it entered a 'unitary judgment . . . based on the erroneous premise that it had power to reach the Union's conduct in its entirety.' *Amalgamated Meat Cutters v. Fairlawn Meats*, 353 U.S. 20, 24-25."

4. The justification advanced in favor of the Court's conclusion reduces to the assertion that the state has an unquestioned hold of a substantial part of the controversy by virtue of its power to adjudicate the va-

idity of expulsion from membership. But this states the problem, not its solution. It no more justifies the state's engulfment of the whole of the controversy than would the Labor Board's indubitable hold upon the discrimination in employment aspect of the dispute justify total ouster of the state. It is not an either-or proposition. An harmonious adjustment of the federal-state relations which mutilates neither the federal scheme nor the state system requires simple recognition that the area of federal competence is not within the state's domain.

This was indeed the adjustment effect by this Court in *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131. There, the state court's undoubted power to enjoin violent conduct did not extend to regulation of peaceful picketing, although the controversy in its entirety embraced a single situation. Said the Court (*id.* at 139):

Though the state court was within its discretionary power in enjoining future acts of violence, intimidation and threats of violence by the strikers and the union, *yet it is equally clear that such court entered the preempted domain of the National Labor Relations Board insofar as it enjoined peaceful picketing by petitioners.* The picketing proper, as contrasted with the activities around the headquarters, was peaceful. There was little, if any, conduct designed to exclude those who desired to return to work. Nor can we say that a pattern of violence was established which would inevitably reappear in the event picketing were later resumed. Cf. *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287. What violence there was was scattered in time and much of it was unconnected with the

picketing. There is nothing in the record to indicate that an injunction against such conduct would be ineffective if picketing were resumed. (Emphasis supplied.)

We discern no difference between this case and *Rainfair*, except that in *Rainfair* the state court "entered the preempted domain" to enjoin conduct protected by the federal act, and here the state court awarded compensation for conduct prohibited by the federal act. But the domain is equally preempted whether the conduct is "prohibited by the federal Act" or "within the protection afforded by that Act. . . ." *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 481.

5. Until this case, except for the ambiguous area of violent conduct, it was datum that if the subject was within the jurisdiction of the Labor Board it was not within the power of the state court. This case, together with the Court's declination on June 2, 1958 to review *Teamsters Union, Local 174 v. Selles*, No. 649, October Term, 1957, a declination which it is fairly inferable is based on the outcome here, has thrown the field into bewilderment. For *Selles* cannot rest on this case, and if nevertheless the Court conceives that "litigating elucidation" is not necessary to explain *Selles*, then the guideposts are no longer discernible.

Selles cannot rest on this case, for the essential predicate of state court jurisdiction in this case—power to adjudicate the validity of expulsion from membership—is absent in *Selles*. The state court found, as the record in *Selles* shows (St. 136), that "Selles was, and still is, a member of Local 174" (314 P.2d 456, 457). Furthermore, *Selles* recovered dam-

ages solely for his loss of earnings (Trial Court's instructions No. 1 and 9, St. 447, 454-455), not for any mental or physical suffering, and not augmented by punitive damages. The money judgment was therefore the equivalent of a back pay award. And the conduct which was the basis of the recovery—which the state court adjudicated under the rubric of a common law tort of interference with employment—was forthrightly recognized by the state court to constitute “an unfair labor practice under the Act” (314 P.2d at 459).

Thus, Selles incurred the displeasure of the union's officialdom by organizing a meeting looking towards a change in the union's leaders and policies (314 P.2d at 457-458). In retaliation for this activity—conduct found by the state court to be “for mutual aid or protection” (314 P.2d at 458)—the union refused to dispatch Selles for work from the hiring hall—conduct found by the state court to constitute “discrimination in regard to hire” (*ibid.*). The union controlled employment in Selles' field of work, and without the approval of its officials no work could be obtained (*ibid.*). As a result, Selles was without work for over a year, except for two short periods of time, and was ultimately compelled to leave the industry and find less remunerative work in another field (314 P.2d at 457).

Selles filed a charge with the Labor Board, alleging these facts; the Board issued a complaint (314 P.2d at 457). But before a hearing could be had, Selles withdrew his charge and instituted the state court action in place of the Labor Board proceeding (*ibid.*). The state court concluded that the “facts reasonably bring the controversy within the purview of the Act” (314 P.2d at 458). And it stated that the question presented, which it answered no, was (314 P.2d at 459):

Does the National Labor Relations Board have exclusive jurisdiction over matters involving conduct which constitutes an unfair labor practice under the Act, so as to preclude a state court from hearing and determining a common-law tort action for damages resulting from interference with employment based on such conduct?

If the instant case answers this question no, then it stands for much more than the opinion discloses, and rehearing is required on this score alone. If the instant case does not answer this question, an answer is required if we are to have any idea of the metes and bounds of federal authority and state power. *Selle* is as appropriate a vehicle for "litigating elucidation" as any, and certiorari should be granted in conjunction with a rehearing of this case.⁴

WHEREFORE, this petition for rehearing should be granted.

Respectfully submitted,

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June, 1958.

⁴ We are informed that a petition for rehearing of the denial of certiorari is to be filed in *Selles*.

CERTIFICATE OF COUNSEL

I certify that this petition is filed in good faith and not for purposes of delay.

BERNARD DUNAU

Attorney for Petitioners.

June, 1958.